SUPREME COURT OF THE UNITED STATES.

No. 254.

SAMUEL C. MORGAN. COMPLAINANT AND APPELLANT,
vs.
THE TOWN OF BELOIT, SIMON RUBLE, A. R. PECK, ASAHEL HENDERSON, JOHN G. POTTER, WILLIAM ALVERSON, J. CHAMBERLAIN, E. F. GATES, AND JOSEPH BENNETT.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF WISCONSIN.

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Circuit court of the United States of America for the district of Wisconsin.

UNITED STATES OF AMERICA,
District of Wisconsin, ss:

At a stated term of the circuit court of the United States of America for the district of Wisconsin, begun and held according to law, at the city of Milwaukee, in said district of Wisconsin, on the second Monday (being the eighth day) of April, A. D. 1867, present: the Honorable Andrew G. Miller, district judge, presiding, among other, the following proceedings were had, to wit:

SAMUEL C. MORGAN, complainant, *vs.* THE TOWN OF BELOIT, SIMON RUBLE, A. R. Peck, Asahel Hendenon, John G. Potter, William Alverson, J. Chamberlain, E. F. Gates, & Joseph Bement, defendants.	In equity.

Be it remembered, that heretofore, to wit, on the fifth day of January, A. D. 1867, came the above-named Samuel C. Morgan, complainant, by Mr. Carpenter, his solicitor, and filed his bill of complaint against the defendants, as follows:

Bill of complaint.

To the judges of the circuit court of the United States for the district of Wisconsin, in equity.

Samuel C. Morgan, of Norwich, Connecticut, a citizen of the State of Connecticut, brings this his bill against The town of Beloit, a municipal corporation created by and existing under the laws of the State of Wisconsin, Simon Ruble, A. R. Peck, Asahel Hendenon, John G. Potter, William Alverson, J. Chamberlain, E. F. Gates, Aaron Teal, and John Bement, of the town of Beloit, in the State of Wisconsin, citizens of the State of Wisconsin, defendants. And, thereupon, your orator complains and shows unto your honors:

2 That the legislature of the State of Wisconsin, in A. D. 1853, passed and enacted a certain statute law, entitled "An act to authorize the town of Beloit to aid in construction of a certain railroad from the city of Racine to the village of Beloit," which was approved on the 10th day of February, A. D. 1853, being chapter 12 of the Private and Local Laws of the State of Wisconsin, passed and enacted in the said year 1853, which said act provided as follows, that is to say:

Stock to be subscribed.

"SECTION 1. The board of supervisors of the town of Beloit are hereby authorized to subscribe for the town of Beloit one hundred thousand dollars to the

capital stock of a railroad company authorized to construct a railroad from the city of Racine to the village of Beloit, and to pay for the same in the bonds of said town, payable in twenty years, with interest, payable annually in the city of New York, not exceeding seven per cent.

Stock pledged.

"SEC. 2. The shares of stock in said railroad company thus taken by said town, and all dividends arising from the same, are hereby irrevocably pledged for the payment of the interest and principal of said bonds: Provided,

Proviso.

however, that the board of supervisors of said town may sell such shares, but the proceeds thereof, and interest, shall still be pledged to pay the interest and principal of said bonds.

Tax to be levied.

"SEC. 3. The board of supervisors of the town of Beloit, whenever the same shall become necessary, shall levy a tax upon the taxable property of said town, sufficient to pay the interest upon such bonds, after deducting the dividends due to such town on said shares of stock.

Railroad commissioner.

"SEC. 4. The board of supervisors of said town shall appoint one railroad commissioner, who shall attend the annual or special meetings of the stockholders of said railroad company for the election of directors thereof, and shall be entitled to cast one vote for every share of stock which said town shall hold in said railroad company, and in case of his absence, or inability to attend, to appoint, in writing under their hands, some other person who shall have the same power.

Condition of issuing bonds.

"SEC. 5. No bonds shall be issued in pursuance of the provisions of this act until a majority of the legal voters of said town, voting upon said question, shall vote in favor of the same at an election called by the said board of supervisors for that purpose, to be held in the village of Beloit. At such election those voting in favor shall vote a ballot with the words inscribed thereon, "For the Railroad," and those voting against shall vote a ballot with the words inscribed thereon, "Against the Railroad." One week's previous notice of said election shall be given in a public newspaper printed in the village of Beloit, and this act shall be published in connection therewith. Said election shall be conducted, and the returns thereof made and canvassed in the same manner as the annual town meetings of the (said town.)

"SEC. 6. This act shall take effect immediately."

Approved, February 10, 1853.

That the board of supervisors of said town, on the 28th day of March, A. D. 1853, called an election, under & in pursuance of said act, to be held in the then village of Beloit mentioned in said act, on the 7th day of April, A. D. 1853, and caused one week's notice thereof to be published in the Beloit Journal, a public newspaper then printed in said village and town of Beloit, one week preceding said election, and that said act was also then & there published, together and in connection with said notice, in said paper. That said election so called was duly held, conducted, and cavassed, under & in pursuance of said act and notice; that a majority of all the votes cast at the said

election were " for the railroad;" and in favor of issuing said bonds mentioned in said act; and that, thereafter, the said board of supervisors of said town, subscribed in the name, and on behalf of said town, for one hundred thousand dollars to the capital stock of the Racine, Janesville & Mississippi Railroad Company, a railroad company then & there authorized to build a railroad from the city of
4 Racine to the village of Beloit, and paid the said subscription in and with the bonds of said town of Beloit, to the amount of one hundred thousand dollars in all; that is fifty of the bonds of said town, numbered from 1 to 50, inclusive, each for the sum of one thousand dollars, and one hundred of the bonds of said town, numbered from 51 to 150, inclusive, each for the sum of five hundred dollars, all of said bonds payable on the 10th day of February, A. D. 1873, with interest at the rate of seven per cent. per annum, with coupons thereto attached, in the usual form, for the interest on said bonds; a copy of the body of one of each classes of said bonds, except number and coupons thereto attached are hereto attached, and marked respectively exhibits No. 1 & No. 2; which said bonds, to the amount of one hundred thousand dollars in all, principal sum, with said coupons thereto attached, the said board of supervisors delivered to said railroad company, on or about the day of the date thereof, in payment of said subscription; and said bonds were thereafter sold by said railroad company, with all the coupons thereto attached, maturing after February 10th, 1854, and the said bonds and the said coupons maturing as aforesaid, passed thereafter from hand to hand in the stock market of the country, like other negotiable securities.

Your orator further shows, that afterwards, to wit: on the 22d day of December, A. D. 1860, your orator being the bona fide holder of certain of the then past due coupons from said bonds, and then being a citizen of the State of Connecticut, commenced an action at law in the district court of the United States for the district of Wisconsin, against the said town of Beloit, to recover the amount of said coupons against said town, and that after due service of process upon and appearance in said action by said defendant, the town of Beloit, such proceedings were duly had, that by the judgment and consideration of said district court, your orator, in said action at law, on the 9th day of Janury, A. D. 1861, recovered a judgment against
5 said town of Beloit for the sum of 1,540 dollars damages, and 25 74-100 dollars costs, by him in and about said cause expended, as appears by the record of said judgment now remaining on the law side of this honorable court. That said judgment, on the day and year last aforesaid, was duly docketed in said district court; that said judgment remains in full force, not in any manner reversed or set aside, that the whole amount thereof remains unpaid, and is legally and equitably due and owing from said town of Beloit to your orator; and that this bill is not exhibited by collusion with said town of Beloit, or any other person or persons, nor to cloak the property of said debtor or any other person or persons, nor to hinder, delay or defraud other creditors of said town, but that the same is exhibited for the sole and only purpose of enforcing payment and satisfaction of said judgment against said town.

Your orator further shows, that by the laws of the said State of Wisconsin, no writ of fieri facias can be issued on any judgment at law against a town of said State: and that your orator cannot have a writ of fieri facias in his said judgment against said town of Beloit.

Your orator further shows, that the said board of supervisors of said town of Beloit has never levied a tax to pay any part of the interest that has matured on said bonds, nor to pay your orator's said judgment; that the said railroad company has never made any dividend on any of its capital stock; that said railroad company has for many years been wholly insolvent, and that the inhabitants of said town of Beloit, and the several persons who have been members of the board of supervisors of said town since February 1, A. D. 1854, have well known, since the day and year last aforesaid, and now know, that there is no other source from which the interest on said bonds, including that part thereof merged in your orator's said judg-
6 ment, can be paid except by levying a tax, under said act, upon all the taxable property of said town to pay the same, and your orator has repeatedly requested and demanded of the said board of supervisors of said town, that said board should levy a tax as aforesaid, sufficient to pay said judgment; but that said board of supervisors have, notwithstanding the premises, ever neglected and refused to levy the same, or to make any provision whatever for the payment and satisfaction of said judgment.

Your orator further shows, that on the 16th day of January, A. D. 1862, your orator applied to and obtained from said district court, a writ of mandamus, in due form of law, peremptorilly commanding the said board of supervisors and the town clerk of said town to levy a tax as aforesaid, on all the taxable property of said town of Beloit, sufficient to pay and satisfy said judgment, and immediately thereafter caused the same to be served upon Simon Ruble and Charles Peck, two, and constituting a quorum, of the board of supervisors elected for the then current year; and upon P. Bostwick, then being town clerk of said town; which said writ, with the return of the marshal thereon, remains of record on the law side of this honorable court, and has never been vacated or set aside by said court, or by any court or jurisdiction whatever. That your orator caused said writ to be immediately thereafter duly served upon said supervisors and said town clerk, who refused and neglected to obey the same; that thereupon, on the 12th day of January, A. D. 1863, your orator moved this court, on the law side thereof, for an attachment against the said Simon Ruble, chairman of said board of supervisors for not having levied a tax in pursuance of said writ; and, thereupon, said court refused said attachment, it being shown to said court that said supervisors, except said chairman, had resigned

That on the 7th day of May, A. D. 1863, said court granted a rule commanding said chairman of said board, and the supervisors
7 constituting said board, to show cause before this court, at the court-room in the city of Milwaukee, on the 2d Monday of June then next, why a peremptory writ of mandamus should not issue, compelling said board of supervisors to levy a tax according to

law to pay the said judgment in favor of your orator; and directing that a copy of said order should be served on the said chairman and each of the said supervisors, at least ten days before said second Monday of June then next; and that such proceedings were thereupon and thereafter had; that this court on the 23d day of June, A. D. 1863, on a full hearing of said rule to show cause, held and directed that it appeared to said court that two of said board had resigned prior to the issuing and service of the said rule, and, thereupon, said court decided that said rule should be discharged.

Your orator further shows, that on the 4th day of August, A. D. 1866, your orator caused a transcript and an exemplification of the record of your orator's said judgment, together with an affidavit of Matt. H. Carpenter, your orators' attorney of record in said judgment, stating that said judgment had not been reversed, appealed from nor removed to other court, nor paid nor satisfied in whole, or in part, to be filed in the office of the town clerk of said town, G. A. Morse, and demanded of said town clerk, that he should proceed to assess the amount of said judgment, with interest from the date of said judgment to the time when the warrant for the collection thereof would expire, upon the taxable property of said town. and that the same should be collected like other town taxes and paid to your orator; but the said town clerk hath wholly omitted, neglected, and refused so to do.

Your orator is advised, and further shows and suggests to your honors, that the remedy by mandamus is not an adequate, convenient, or efficacious remedy in cases like your orator's; that by the law of the State, the town clerk and the board of supervisors of said town are elected annually, that the tax for the payment of your
8 orator's judgment can only be levied on one certain day in the year; that it cannot be known before that day, that the officers will not do their duty in the premises; and after that day it is too late to compel them to discharge their duty; and that your orator is wholly without adequate remedy in the premises by the strict course of the common law, and can only be relieved in a court of equity whose remedies are adapted to such a case.

Your orator further shows, that the inhabitants of said town of Beloit, for the purpose of evading the payment and satisfaction of your orator's said judgment, and for the purpose of evading and preventing the levying of a tax, as aforesaid, to pay said judgment or any part of the interest now past due on said bonds, have fraudulently colluded and conspired together, and have agreed and combined to prevent there being any board of supervisors of said town: and that there has not been, since January 1, A. D. 1863, any board of supervisors of said town authorized or qualified to act as such board; that at each of the annual town elections in said town held subsequent to the day and year last aforesaid, the electors of said town cast their ballots for persons who were known to be opposed to paying said judgment or any part of said interest, and that after said election had been held and canvassed, two of the persons elected into said board, in pursuance of a previous understanding, and to evade

the duty of levying a tax, have failed to qualify; so that since the day and year last aforesaid, there has been no board of supervisors to perform and execute the duty commanded to be performed by said peremptory writ of mandamus.

Your orator further shows, that at the election duly held in said town of Beloit, on the 7th day of April, A. D. 1863, Charles Peck was elected chairman of the board of supervisors of said town, and A. Henderson and Simon Ruble were elected supervisors of said town, and that Perry Boswick was elected town clerk of said
9 town; and that in pursuance of said conspiracy and understanding, the said Henderson and the said Ruble resigned April 24, A. D. 1863, and the said board remained vacant, except said chairman, until the annual town election which was held in said town, on the 5th day of April, A. D. 1864, when at said election, the said Charles Peck was elected chairman of said board, and Nathan Stoddard and Clark Nye were elected supervisors of said town; but that in pursuance of said conspiracy, said Stoddard and said Nye failed to qualify, and said board of supervisors remained vacant, except said chairman, until the annual town meeting which was duly held in said town, on the 4th day of April, A. D. 1865, when the said Charles Peck was again elected chairman of said board, and Simon Ruble and A. R. Parrish were elected supervisors; but that in pursuance of said conspiracy, said Ruble and said Parrish did not qualify, and said board remained vacant, except said chairman, until the annual town meeting held in said town, on the 3d day of April, A. D. 1866, when said Charles Peck was elected chairman, and said Simon Ruble and Clark Nye were elected supervisors of said town; but that in pursuance of said conspiracy, the said Ruble and the said Nye refused or neglected to qualify, and said board ever since has remained vacant, except said chairman, since the day and year last aforesaid.

Your orator further shows, that at the annual town election held in said town, on the 3d day of April, A. D. 1866, G. A. Morse was duly elected town clerk of said town of Beloit, and that he duly qualified and entered upon the duties of his office, on the 10th day of April, A. D. 1866, and now is town clerk of said town.

And your orator further shows, on information and belief, that it is the intention and purpose of a majority of the legal voters of said town, by the means and in the manner aforesaid, to prevent any board of supervisors being elected and qualified, so as to thereby defeat, hinder, delay and defraud your orator in the collection of his said judgment; and in consequence of the premises, your ora-
10 tor cannot compel the levy of said tax by writ of mandamus. And your orator is, therefore, without remedy by the strict rules of the common law, to collect his said judgment.

Your orator further shows, that all of said defendants, except the said town of Beloit, are residents, inhabitants, voters, and property owners and tax payers of said town of Beloit, and are the owners, respectively, of the following described real estate in said town of Beloit, subject to taxation and sale to satisfy your orator's said judgment; that is to say:

The said Simon Ruble is the owner of the south half of the northeast quarter of section 31, in said town; the southeast quarter of said section 31; the northeast quarter of section 32, and the southwest quarter of said section 32, in said town.

The said A. R. Peck is the owner of the east third of the west half of northeast quarter of section 13, and the south part of the west half of the southwest quarter, and the north half of the southeast quarter of said section 13, in said town.

The said Asahel Henderson owns the south third fraction of northeast quarter of section 11, and the south third of the northwest quarter of section 12, all in said town.

The said John G. Potter owns the southwest quarter of section 17, in said town.

The said William Alverson owns the south half of the northeast quarter, and north half of southeast quarter of section 19, in said town.

The said J. Chamberlain owns the west half of the southeast quarter, and the east two-thirds of the south half of southwest quarter of section 20, in said town.

The said E. F. Gates owns the east half of northeast quarter of section 13, in said town.

Aaron Teal owns the east part of south half of southwest quarter of section 3, in said town.

Joseph Bement owns the east side of the west half of southeast quarter of section 10, and the southwest quarter of *southwest quarter* section 16, all in said town.

11 That your orator cannot give a more definite or detailed description thereof, but claims full discovery from each of said defendants, except said town, as to the precise description of all the real estate owned by him, respectively, in said town, which is subject to taxation in said town by the laws of the State of Wisconsin.

Your orator further shows, that the real estate hereinbefore described is of value exceeding your orator's said judgment, together with interest, and all cost thereon.

Your orator further shows, that the inhabitants of said town of Beloit, other than those hereinbefore named as defendants, are very numerous, and unknown to your orator; that those named as defendants to this bill are leading and influential inhabitants of said town; that it is inconvenient, and nearly impossible to make all of said inhabitants parties defendants to this bill. And your orator prays that he may be excused from so doing, and that the said persons named as defendants to this bill, except the said "town of Beloit," may be taken and held to represent all the tax payers of the said town of Beloit for all the purposes of this suit.

To the end, therefore, that the defendants may, if they can, show why your orator should not have the relief hereby prayed, and may, upon their several and respective corporal oaths, and according to the best and utmost of their several and respective knowledge, remembrance, information, and belief, full, true, direct, and perfect

answer make to all the matters and charges aforesaid, and that, too, as fully as if the same were here again set down and repeated, paragraph by paragraph, and they, and each of them thereto particularly interrogated.

And that the amount of said judgment, together with interest and costs, may be decreed to be due and payable from the said town of Beloit to your orator; and that the said real estate herein-
12 before described, or so much thereof as may be sufficient to satisfy the same, together with costs of this suit, may be decreed by this court to be sold at public auction by the marshal of the district, and that the avails thereof may be brought into court, to be applied to your orator's said judgment.

And that your orator may have such other or further or different relief in the premises as may be agreeable to equity and good conscience, and as the nature of his case may require—

May it please your honors to grant unto your orator a writ of subpœna, to be issued out of and under the seal of this honorable court, to be directed to the said town of Beloit, Simon Ruble, A. R. Peck, Asahel Henderson, John G. Potter, William Alverson, J. Chamberlain, E. F. Gates, Aaron Teal, and Joseph Bement, and to each and every of them, therein and thereby commanding them, and each of them, by a day certain, and under a certain penalty therein to be named, to be and appear before your honors in said court in chancery to answer, and stand to and abide by such order or decree as your honors may render therein, and as your orator will ever pray.

MATT. H. CARPENTER,
Sol. for Complainant.

MATT. H. CARPENTER,
Of Counsel for Complainant.

Exhibit No. 1.

By special authority of the State legislature.

UNITED STATES OF AMERICA.

No. —. *Town of Beloit, State of Wisconsin.* $1,000.

The town of Beloit acknowledge themselves to owe the Racine, Janesville, and Mississippi Railroad Company the sum of one thousand dollars for ten shares, of one hundred dollars each, in the capital stock of said company, subscribed for and purchased of said company by said town, which sum said town promise to pay to said
13 company, or to the holder hereof, at their office in the city of New York, on the tenth day of February, 1873, and also interest thereon at the rate of seven per centum per annum, payable annually on the tenth day of each February ensuing the date hereof, until the said principal sum shall be paid, on presentation of the annexed interest warrants at said office.

And it is further agreed, that this obligation, and all rights and benefits arising therefrom, may be transferred by general or special endorsement, or by delivery, as if the same were a note of hand payable to bearer.

In testimony whereof, the board of supervisors of said town have caused to be affixed its corporate seal, and these presents to be subscribed by their chairman, and attested by the clerk thereof, this 21st day of May, 1853.

JOHN EASTERLY, *Chairman.*

Attest: M. V. PASCO, *Clerk.*

I, M. V. Pasco, clerk of the town of Beloit, do hereby certify that the foregoing obligation is issued in pursuance of a special act of the legislature of the State of Wisconsin, entitled "An act to authorize the town of Beloit to aid in the construction of a certain railroad from the city of Racine to the village of Beloit," approved February 10th, 1853, and sanctioned by a majority of the legal voters of said town at an election held for such purpose, April 7th, 1853.

M. V. PASCO.

Exhibit No. 2.

By special authority of the State legislature.

UNITED STATES OF AMERICA.

No. —. *Town of Beloit State of Wisconsin.* $500.

The town of Beloit acknowledge themselves to owe the Racine, Janesville, and Mississippi Railroad Company the sum of five hundred dollars for five shares, of one hundred dollars each, in the capital stock of said company, subscribed for and purchased of said
14 company by said town, which sum said town promise to pay to said company, or to the holder hereof, at their office in the city of New York, on the tenth day of February, 1873, and also interest thereon at the rate of seven per centum per annum, payable annually on the tenth day of each February ensuing the date hereof, until the said principal sum shall be paid, on presentation of the annexed interest warrants at said office.

And it is further agreed, that this obligation, and all rights and benefits arising therefrom, may be transferred by general or special endorsement, or by delivery, as if the same were a note of hand payable to bearer.

In testimony whereof, the board of supervisors of said town have caused to be affixed its corporate seal, and these presents to be subscribed by their chairman, and attested by the clerk thereof, this 21st day of May, 1853.

JOHN EASTERLY, *Chairman.*

Attest: M. V. PASCO, *Clerk.*

I, M. V. Pasco, clerk of the town of Beloit, do hereby certify that the foregoing obligation is issued in pursuance of a special act of the legislature of the State of Wisconsin, entitled "An act to authorize the town of Beloit to aid in the construction of a certain railroad from the city of Racine to the village of Beloit," approved February 10th, 1853, and sanctioned by a majority of the legal voters of said town at an election held for such purpose, April 7th, 1853.

M. V. PASCO.

Whereupon a subpœna issued as follows:

UNITED STATES OF AMERICA,
District of Wisconsin:

[SEAL.] The President of the United States of America, to the town of Beloit, Simon Ruble, A. R. Peck, Asahel Henderson, John G. Potter, William Alverson, J. Chamberlain, E. F. Gates, Aaron Teal, and Joseph Bement, greeting:

[50-c. stamp, cancelled.]

You are hereby commanded, that you personally appear before the judges of the circuit court of the United States of America, for the district of Wisconsin, in our court of chancery, in and for the district aforesaid, on the first Monday of February next ensuing, at Milwaukee, to answer to a bill of complaint exhibited against you in our said court by Samuel C. Morgan, and to do further, and receive what our said court shall have considered in that behalf; and this you are not to omit under the penalty which may ensue.

This process of subpœna is directed to the marshal of this district, who is hereby commanded to serve the same upon the said town of Beloit, Simon Ruble, A. R. Peck, Asahel Henderson, John G. Potter, William Alverson, J. Chamberlain, E. F. Gates, Aaron Teal, and Joseph Bement, if to be found in his district, and due return thereof make.

Witness, the Honorable Salmon P. Chase, Chief Justice of the Supreme Court of the United States, at the city of Milwaukee, in the said district, this fifth day of January, in the year of our Lord one thousand eight hundred and sixty-seven, and of our independence the ninety-first.

A. SCOTT SLOAN, *Clerk.*
By JAMES McFARLIN, *Deputy.*

MATT. H. CARPENTER, *Solicitor.*

It is ordered by our said court, that the said town of Beloit, Simon Ruble, A. R. Peck, Asahel Henderson, John G. Potter, William Alverson, J. Chamberlain, E. F. Gates, Aaron Teal, and Joseph Bement, the defendants aforesaid, do enter their appearance in this suit, in the clerk's office, on or before the day and time at which this subpœna is returnable, as aforesaid; otherwise the bill filed may be taken as confessed.

16 And afterwards, and on or before the return day of said subpœna, came the said marshal and returned the same with his return endorsed thereon, as follows:

Return to subpœna.

"Served on the named town of Beloit, by leaving a copy of this subpœna with Charles Peck, chairman of the board of supervisors of the town of Beloit, at his usual place of abode with a free white person, a member of the family, this 11th day of Jan., 1867. Also, served on the within named town of Beloit, by delivering to George Morse, clerk of the town of Beloit, personally, a copy of this subpœna; also, served on the within named town of Beloit, by leaving a copy of this subpœna with Clark Nye, one of the supervisors elect of the said town at his usual place of abode, with a free white person, a member of his family; also, served on the within named Simon Ruble, John G. Potter, Asahel Henderson, J. Chamberlain, E. F. Gates, Aaron Teal, and Joseph Bement, by delivering each of them personally a copy of this subpœna; also, served on the within named A. R. Peck and W. Alverson, by leaving a copy of this subpœna at their usual place of abode, with a free white person, a member of the family, this 11th day of Jan., 1867.

CASSIUS FAIRCHILD, *Marshal.*
By A. E. BURPEE, *Deputy.*

Fees, $35 40.

Served on the within named town of Beloit by delivering to Charles Peck, chairman of the board of supervisors of the town of Beloit, personally, a copy thereof, this 19th day of Jan'y, 1867.

CASSIUS FAIRCHILD, *Marshal.*
By A. E. BURPEE, *Deputy.*

Appearance.

And afterwards, to wit, on the 21st day of January, A. D. 1867, came the defendants, by their solicitors, Mess. Palmer and Hooker, and filed their appearance as follows:

17 U. S. circuit court, district of Wisconsin.

SAMUEL C. MORGAN
v.
TOWN OF BELOIT, SIMON RUBLE, A. R. PECK, Asahel Henderson, John G. Potter, William Alverson, J. Chamberlain, E. F. Gates, Aaron Teal, and Joseph Bement. } In equity.

SIR: Please enter our appearance as solicitors for the defendants in the above-entitled suit.

Yours, &c.,
PALMER & HOOKER,
Sol'rs for Def'nts.

Milwaukee, Jan'y 21, 1867.

To A. Scott Sloan, eqr., *Clerk, &c.*

And afterwards, to wit, on the 2d day of February, A. D. 1867, came the defendant, Aaron Teal, and filed his answer, as follows:

Answer of Aaron Teal.

Circuit court of the United States for the district of Wisconsin.

SAMUEL C. MORGAN
v.
THE TOWN OF BELOIT, AARON TEALL & OTHERS. } In equity.

The answer of Aaron Teall, one of the defendants in the bill of complaint in this cause named, answering says, that he is not the owner of any of the real estate mentioned in said bill, that he is not an inhabitant of said town of Beloit, and that he owns no taxable property whatever in said town of Beloit; and he hereby disclaims any interest whatever in the subject matter of said bill.

ARON TEALL.

DISTRICT OF WISCONSIN, *ss:*

This 2d day of February, A. D. 1867, Aaron Teall, personally appeared before me, and being by me first duly sworn on oath, says that he has heard read and knows the contents of the foregoing answer by him subscribed, and that the same is true.

JAMES McFARLIN,
U. S. Commissioner Dist. of Wis.

18 And said answer was endorsed as follows:

Bill dismissed as to Aaron Teall.

We hereby stipulate that the bill of complaint in this cause be dismissed as to Aaron Teal, without costs to either party.

MATT. H. CARPENTER,
Sol'r for Compl't.
ARON TEALL.

And afterwards, to wit, on the first Monday of February, A. D. 1867, being a rule day of said court, came the complainant, by his solicitor, and entered in the order and rule book, a rule to plead, as follows:

Rule to plead.

Circuit court of the U. S. district of Wisconsin, of the first Monday of February, 1867.

SAMUEL C. MORGAN
v.
THE TOWN OF BELOIT, SIMON RUBLE, *et al.* } In equity.

Here in court comes the complainant by his solicitor, Matt. H. Carpenter, and on his motion, ordered that the defendants plead, an-

swer or demur to the bill of complaint on file on or before the first Monday of March next, or in default thereof said bill of complaint will be taken as confessed against them.

MATT. H. CARPENTER,
Sol'r for Comp'lt.

Demurrer of town of Beloit.

And afterwards, to wit, on the fourth day of March, A. D. 1867. came the defendant town of Beloit, by its solicitors, Messrs. Palmer & Hooker, and filed its demurrer as follows:

U. S. circuit court, district of Wisconsin.

SAMUEL C. MORGAN
v.
THE TOWN OF BELOIT, SIMON RUBLE, A. R. Peck, Asahel Henderson, John G. Potter, William Alverson, J. Chamberlain, E. F. Gates, Aaron Teal, and Joseph Bement.

19 The demurrer of the town of Beloit, defendants to the bill complaint of Samuel C. Morgan, complainant.

This defendant by protestation, not confessing or acknowledging all or any of the matters and things in the said complainant's bill of complaint to be true, in such manner and form as the same are therein set forth and alleged, demurs thereto and for cause of demurrer shows to the court that the said complainant hath not in and by his said bill of complaint made or stated such a case as doth or ought to entitle him to any such discovery or relief as is thereby sought and prayed for from or against this defendant. Wherefore, this defendant demands the judgment of this honorable court whether this defendant shall be compelled to make any further or other answer to the said bill, or any of the matters and things therein contained, and prays to be hence dismissed with its reasonable costs in this behalf sustained.

PALMER & HOOKER,
Solicitors for Defendants.

E. G. RYAN,
H. L. PALMER, *of Counsel.*

I certify that in my opinion the foregoing demurrer is well founded in point of law.

Milwaukee, Feb. 26, 1867.

H. L. PALMER,
Of Counsel for Def't.

DISTRICT OF WISCONSIN, *Rock county, ss:*

Charles Peck, of said county, being duly sworn says that he is chairman of the board of supervisors of the town of Beloit, the defendant in the above entitled action, that the said defendant, the town of Beloit, is a municipal corporation, that this deponent is the

chief officer of the said town of Beloit and makes this affidavit in its behalf, that the foregoing demurrer of the said defendant, the town of Beloit, is not interposed for delay.

Subscribed and sworn to before me this — day of February, A. D. 1867.

20 Copy of the within served on me this 4th day of March, 1867, and I waive the verification.

M. H. CARPENTER.

Demurrer of Simon Ruble, et als.

And same day, (March 4, 1867,) came the defendants, Simon Ruble, A. R. Peck, Asahel Henderson, John G. Potter, William Alverson, J. Chamberlain, E. F. Gates, Aaron Teall, and Joseph Bement, by their solicitors, and filed their demurrer, as follows:

U. S. circuit court, district of Wisconsin.

SAMUEL C. MORGAN
v.
THE TOWN OF BELOIT, SIMON RUBLE, A. R. Peck, Asahel Henderson, John G. Potter, William Alverson, J. Chamberlain, E. F. Gates, Aaron Teal, and Joseph Bement.

The demurrer of Simon Ruble, A. R. Peck, Asahel Henderson, John G. Potter, William Alverson, J. Chamberlain, E. F. Gates, Aaron Teal, and Joseph Bement, defendants to the bill of complaint of Samuel C. Morgan, complainant.

These defendants, respectively by protestation, not confessing or acknowledging all or any of the matters and things in the said complainants' bill of complaint to be true, in such manner and form as the same are therein set forth and alleged, do demur thereto and for cause of demurrer show to the court that the said complainant hath not in and by his said bill made or stated such a case as doth entitle him to any such discovery or relief as is thereby sought and prayed for from or against these defendants. Wherefore these defendants demand the judgment of this honorable court whether they shall be compelled to make any further or other answer to the said bill, or any of the matters and things therein contained, and pray to be hence dismissed with their reasonable costs in this behalf sustained.

PALMER & HOOKER,
Sol'r for Def'nts.

E. G. RYAN,
H. L. PALMER, *of Counsel.*

21 I certify, that in my opinion the foregoing demurrer is well founded in point of law.

Milwaukee, Feb., 26, 1867.

H. L. PALMER, *of Counsel.*

DISTRICT OF WISCONSIN, *Rock County, ss:*

Simon Ruble, A. R. Peck, Asahel Henderson, John G. Potter, William Alverson J. Chamberlain, E. F. Gates, Aaron Teal, and Joseph Bement, being duly and severallysworn, each for himself, and not one for the other, deposes and says that the foregoing demurrer is not interposed for delay.

Subscribed and sworn to me this day of February, A. D. 1867.

Endorsed: Copy of the within served on me, and I waive verification this 4th day of March, 1867.

MATT. H. CARPENTER.

Demurrer set down for argument.

And same day (March 4, 1867,) came the complainant, by his solicitor, and entered in the order and rule book an order setting the said demurrers down for argument, as follows:

U. S. circuit court, district of Wisconsin, of the first Monday of March, 1867.—In equity.

SAMUEL C. MORGAN
vs.
THE TOWN OF BELOIT, S. RUBLE, and others.

On motion of Matt. H. Carpenter, solicitor for the complainant, it is ordered that the demurrer of the defendants to the bill of complaint in this cause be, and the same is, hereby set down for argument.

MATT. H. CARPENTER,
Solicitor for Plaintiff.

Decree.

At a stated term of the circuit court of the United States of America for the district of Wisconsin, begun and held according to law, at the city of Milwaukee, in said district of Wisconsin, on the second Monday (being the eighth day) of April, A. D. 1867.

22 Present: Honorable Andrew G. Miller, district judge, presiding.

On the twentieth day of the said term, to wit, on the third day of June, A. D. 1867, the following proceedings were had, to wit:

Decree.

SAMUEL C. MORGAN
vs.
THE TOWN OF BELOIT, SIMON RUBLE, A. R. Peck, Asahel Henderson, John G. Potter, William Alverson, J. Chamberlain, E. F. Gates, and Joseph Bement. } In equity.

This day, came the parties by their counsel, and on consideration of the several demurrers to this bill, and of the arguments of counsel, it is ordered, adjudged, and decreed by the court that the complain-

ant's bill of complaint be, and hereby is, dismissed, and that the complainant pay the costs to be taxed.

A. G. MILLER.

Decree signed, recorded, and enrolled, June 3d, A. D. 1867.

EDWARD KURTZ, *Clerk.*

Appeal.

And, the same day came the complainant in open court, and prayed an appeal to the Supreme Court of the United States, and filed the bond of M. H. Carpenter and J. A. Noonan, for costs in the sum of five hundred dollars, which bond is approved by the court, and is in the words and figures following, to wit:

Appeal Bond.

Circuit court of the United States for the district of Wisconsin.—In equity.

SAMUEL C. MORGAN
vs.
THE TOWN OF BELOIT, SIMON RUBLE, A. R. Peck, Asahel Henderson, John G. Potter, William Alverson, J. Chamberlain, E. F. Gates, and Joseph Bement.

Know all men by these presents, that we, Matt. H. Carpenter, as principal, and Josiah A. Noonan, as surety, are held and firmly
23 bound unto the town of Beloit, Simon Ruble, A. R. Peck, Asahel Henderson, John G. Potter, William Alverson, J. Chamberlain, E. T. Gates, and Joseph Bement, their heirs and assigns, in the penal sum of five hundred dollars, lawful money of the United States, for the payment of which, well and truly to be made, we hereby bind ourselves, our and each of our heirs, executors, and administrators, firmly by these presents.

Signed with our hands and sealed with our seals, this 3d day of June, A. D. 1867.

Provided, however, this bond is upon this express condition, that whereas, the said Samuel C. Morgan, complainant in the above entitled cause has this day appealed to the Supreme Court of the United States, from the final decree of the circuit court o the United States for the district of Wisconsin, in equity, made and rendered in said cause this day: Now, if the said Morgan shall prosecute his said appeal to effect, or pay the said obligers above-named, their heirs or legal representatives, all costs and damages that may be awarded against him in case he fail so to do, and shall stand to and abide by, and perform such order or decree, and all orders and decrees of the said Supreme Court on said appeal as may be by said Supreme Court rendered thereon, then this bond shall be void, otherwise in full force.

Dated, signed, sealed, and delivered the day and year first above-written.

MATT. H. CARPENTER. [SEAL.]
J. A. NOONAN. [SEAL.]

In presence of—

DISTRICT OF WISCONSIN, *ss:*

Matt. H. Carpenter and Josiah A. Noonan, being first duly sworn, each for himself, on oath, says that he is worth the sum of five
24 hundred dollars, over and above all liabilities and exemptions of property from forced sale on execution, and that he is a resident and free holder of said district.

MATT. H. CARPENTER.
J. A. NOONAN.

Subscribed and sworn to before me this 3d day of June, A. D. 1867.

ALBERT KALVELAGE,
Notary Public, Mil. Co., Wis.

June 3, 1867, this bond approved by the court.

A. G. MILLER.

Appeal allowed.

Whereupon, it is ordered by the court that said appeal be, and hereby is, allowed.

25 UNITED STATES OF AMERICA, *District of Wisconsin, ss:*

I, Edward Kurtz, clerk of the circuit court of the United States of America, for the district of Wisconsin, do hereby certify that I have compared the writings annexed to this certificate, and they are true copies of their respective originals, and are correct transcripts therefrom, and of the whole thereof now on file, and remaining of record in my office, being a full and complete exemplification of the record and proceedings in the suit of Samuel C. Morgan, complainant, against the town of Beloit, and others, defendants, in equity.

In testimony whereof, I have hereunto set my hand and duly affixed the seal of the said court at the city of Milwaukee, in the said district of Wisconsin, this sixteenth day of July, in the year of our Lord one thousand eight hundred and sixty-seven, and of the independence of the said United States, the ninety-second.

[SEAL.] EDWARD KURTZ, *Clerk.*

[5-ct. rev. stamp.]

United States Supreme Court.

DECEMBER TERM, 1868.

SAMUEL C. MORGAN, Appellant,
vs.
THE TOWN OF BELOIT and others. } No. ~~108.~~ 17

SAMUEL C. MORGAN, Appellant,
vs.
THE TOWN OF BELOIT and
THE CITY OF BELOIT. } No. 281.

THE UNITED STATES,
Ex. Rel. SAMUEL C. MORGAN, Plaintiff in Error,
vs.
EGBERT GATES, Town Clerk of the Town of Beloit. } No. 118.

Brief for the Respondent and Defendant in Error.

H. L. PALMER,
E. G. RYAN.

Daily Milwaukee News Steam Print.

Supreme Court of the U. S.

SAMUEL C. MORGAN,
Appellant,

vs.

THE TOWN OF BELOIT, SIMON RUBLE, A. R. PECK, ASAHEL HENDERSON, JOHN G. POTTER, WILLIAM ALVERSON, J. CHAMBERLAIN, E. F. GATES, AND JOSEPH BEMENT.

No. 108, Dec. T., 1868.

This is an appeal from a decree of the court below, dismissing the appellant's bill upon demurrer.

The bill was filed for the collection of a judgment at law in the court below, recovered by the appellant, on coupons of the bonds, discussed at this term, in Nos. 91 and 320.

The bill sets forth the act of Feb. 10, 1853; the election held under it; the subscription of the supervisors to the stock of the Racine, Janesville, and Mississippi Rail Road Company; the payment of the subscription in the bonds of the town; the judgment recovered by the appellant on coupons of the bonds, January 9, 1861; and the non-payment of the judgment.

The bill proceeds to state, that the supervisors had never levied a tax to pay the interest of the bonds, or the appellant's judgment; that the rail road company has never paid any dividend, and is insolvent; that the inhabitants of the town, and the supervisors, knew that there were no means

of paying the interest on the bonds and the judgment, except by tax under the act; that the appellant has demanded a tax to be levied, to pay his judgment; but that the supervisors refused to do so, or to make any provision to pay the judgment.

That, Jan. 16, 1862, the appellant obtained a *mandamus* from the court below, to the supervisors and town clerk, to levy a tax to pay the judgment, and served the same upon the supervisors and clerk, who refused to obey the same; that the appellant thereupon moved for an attachment, which was refused, because the supervisors, except the chairman, had resigned; that afterwards, the court below made a rule on the supervisors, to show cause why a *mandamus* should not issue to levy a tax to pay the judgment; but that, on hearing the rule, it appeared to the court that two of the supervisors had resigned before the rule was made, and that thereupon the rule was discharged.

That afterwards, the appellant filed in the office of the town clerk, an exemplification of the record of the judgment, with an affidavit that the judgment was in force and unpaid, and demanded of the clerk that he assess the amount of the judgment, and that the same be collected like other town taxes; but that the clerk refused to do so.

That *mandamus* is not an adequate, convenient, or efficacious remedy; that, by law, the clerk and supervisors are elected annually; that the tax could be levied only on one certain day; that it cannot be known, before that the officers will not do their duty, and that after, it is too late; and that the appellant is without any remedy at law, and can be relieved only in equity.

That the inhabitants of the town, for the purpose of evading payment of the judgment, and the levy of a tax to pay it, have fraudulently conspired together to prevent any board of supervisors from being; and that there has not been, since January 2, 1863, any board; that at each annual election since, the electors vote for persons opposed to paying the judgment, and then two of the persons elected, by previous

understanding, fail to qualify; so that there has been no board to obey the *mandamus*.

That, at an election held April 7, 1863, certain persons were elected supervisors and clerk; that in pursuance of the conspiracy two of the supervisors resigned April 24, 1863; and that their offices remained vacant until the election held April 5, 1864; and that in pursuance of the conspiracy, the same thing was substantially done at the elections of 1865 and 1866, so that the offices of supervisors, except chairman, remained vacant to the time of filing the bill.

That it is the intention of a majority of the voters, in that manner, to prevent there being any board of supervisors, so as to defeat the payment of the judgment.

That the individual defendants are residents and voters of the town, and hold therein respectively certain specified real estate, sufficient to pay the judgment.

That the other inhabitants of the town are numerous, and unknown to the appellant; that those made defendants are influential; and the bill calls on them for full discovery of all their real estate subject to taxation in the town, and asks that they may be taken to represent all the tax-payers in this suit. The bill prays that the real estate described may be sold to pay the judgment, and for general relief.

To this bill, the town and the other defendants demurred, severally. And the court below sustained the demurrers.

The decree of the court below should be affirmed.

I.

In the brief submitted to the court below, by the learned counsel on the other side, several authorities were cited, in England and New England, to the effect that the private property of every inhabitant is liable to execution against a *quasi* municipal corporation.

1. Without entering into any elaborate examination of the authorities, it is submitted that this is not the common law of America. We know of no American decision in favor of this doctrine, outside of New England, which is given to legal, as well as other notions. And it is believed that the doctrine is *local* there.

The whole doctrine seems to have grown out of the misapplication of some *dicta*, in *Russell vs. The men dwelling in the county of Devon*, 2 *Term R.*, 667.

ASHURST, J., indeed says: "If damages are recoverable against the county, at all events they must be levied on one or two individuals, who have no means of re-imbursing themselves." But this is said as a reason why the action would not lie, which the court unanimously held. LORD KENYON says: "Where an action is brought against a corporation for damages, those damages are not to be recovered against the corporators in their individual capacity, but out of their corporate estate. But, if the county is to be considered as a corporation, there is no corporation fund out of which satisfaction is to be made. Therefore I think that the experiment ought not to be encouraged; and there is precedent against it in *Broke*; though even without that authority, I should be of opinion that this action cannot be maintained." And ASHURST, J., says: "But it has been said that there is a principle of law on which this action might be maintained, namely, that where an individual sustains an injury by the neglect or default of another, the law gives him a remedy. But there is another general principle of law, which is more applicable to this case, that it is better that an individual should sustain an injury, than that the public should suffer an inconvenience." And he states the inconvenience to be the liability of individual property to execution.

But even if the doctrine in question should be considered to be the present doctrine of the English courts, it is submitted, that it is not the law here. *Russell vs. The men of Devon* was decided in 1787; and is no part of the common law which emigrated here.

If it be true, as we believe, that the rule in this country, at the end of nearly a century, is confined to New England, the decisions of that peculiar *imperium in imperio*, rather strengthen than lessen the argument. *Exceptio probat regulam.*

2. But, however that may be, the doctrine can have no relation to Wisconsin towns.

The doctrine of England and New England, is briefly and well stated by PARSONS, C. J., in *Riddle vs. Proprietors &c.*, 7 *Mass.*, 169, in these terms :

"We distinguish between *proper* aggregate corporations, and the *inhabitants* of any district, who are by statute invested with particular powers, without their consent. *These* are in the books sometimes called *quasi* corporations. Of this description are counties and hundreds, in *England ;* and *counties, towns*, &c., in this state. Although *quasi* corporations are liable to information or indictment, for a neglect of a public duty imposed on them by law, yet it is settled in the case of *Russell et al., vs. Inhabitants of the County of Devon*, that no private claim can be maintained against them for a breach of their corporate duty, unless such action be given by statute. And the sound reason is, that, *having no corporate fund*, and *no legal means of obtaining one*, each corporator is liable to satisfy any judgment rendered against the corporation. This burden the common law *will not impose*, but in cases where the statute is an authority, to which every man must be considered as assenting. But, in *regular corporations*, which have, or are supposed to have, *a corporate fund*, this reason does not apply."

The corporate character of towns in Wisconsin, takes them wholly out of this doctrine.

"Each organized town shall be a body corporate, and as such may sue and be sued ; and may appoint all necessary agents and attorneys in that behalf ; and shall have power to purchase and hold real and personal estate for the public use of the inhabitants thereof, and to convey and dispose of the

same ; and to make all contracts that may be necessary and convenient for the exercise of its corporate powers, and any orders for the sale or disposal of its corporate property, which the inhabitants thereof may deem expedient." *R. S.* 1858, *Chap.* 15, *Sec.* 1. *R. S.* 1849, *Chap.* 12, *Sec.* 1.

Other sections give them power to levy taxes and fines.

Thus, the town of Beloit is, in the language of C. J. PARSONS, a *proper* aggregate corporation, not a *quasi* corporation, having a corporate fund, and legal means of obtaining one ; and to it, as such, the doctrine does not apply.

And it not only has a corporate fund, but has a special power and duty to levy a tax for the payment of judgments against it. *R. S., Chap.* 15, *Sec.* 78.

Cessante ratione legis, cessat ipsa lex. There being a corporate fund, removes all reason for the cruel recourse to individual property.

3. It is said, in the statement of this doctrine, that where it applies, no action would lie except by statute. Here the very statute which gives the action, prohibits execution. *Sec.* 77.

If the statute has effect to give the action, it has also effect to take away the execution. And the right claimed is only to levy an execution upon individual property. The right grows out of the execution, and is dependent upon it. All *dicta* to the contrary are unsupported.

And, whatever may be the common law, the statute giving the right of action, prohibiting execution, and giving a particular process and fund for the payment of the judgment, operates, not only to take the case out of the reason of the common law, but to repeal it.

4. The ground on which the doctrine in question rests the right, to levy an execution against a *quasi* corporation, on the private property of corporators, is, that because it is not a corporation proper, the action is to be considered as against all the inhabitants.

On that theory, they have their day in court.

But here the individual defendants have never had their day in court. They cannot have it in this bill; for it does not seek a judgment against them, but only execution against them on a judgment against another, and against which they had no right or opportunity to defend.

And the decree for which the bill prays would violate two fundamental principles. It would deprive the defendants of their property, without due process of law, or the judgment of their peers. And it would take private property for public use, without compensation.

5. The doctrine itself admits its own cruelty and injustice. And a court of equity will not lend its aid to enforce an unjust and oppressive right, conceding it to be a right, in enforcing a judgment at law, which the court at law has no power to enforce. Equity jurisprudence is to mitigate, not to aggravate, the harshness and severity of law.

The bill seeks no relief against the town, makes no other case against the other defendants, and has no other specific prayer. And these objections are fatal to the whole bill.

II.

It is difficult to comprehend on what ground of equity jurisprudence, this bill is intended to rest. No specific ground was assigned for it in the court below. And we confess our inability to conjecture to what class of bills the learned counsel will attempt to assign it.

A good deal was said below about the difficulty of enforcing the judgment by *mandamus*. And *Boyce vs. Grundy*, 3 *Peters*, 210, was cited as an authority, that whenever the remedy at law is doubtful or difficult, a court of chancery has jurisdiction; and other cases were cited of like character. But they are all cases of concurrent jurisdiction at law and in equity. A mere *difficulty* to enforce a right at law, will

not give a remedy in equity. Equity is liberal in the adaptation of her remedies. But it is a mistake that she gives a remedy to every party in difficulty, unless his difficulty be covered by some specific ground of equitable jurisdiction. "The true nature and extent of equity jurisdiction, as at present administered, must be ascertained by a specific enumeration of its actual limits, in each particular class of cases, falling within its remedial justice." *Story's Equity*, *Sec.* 62.

Here, there is an adequate legal remedy, by *mandamus*, which the complainant is diligently prosecuting, as appears by the record in No. 118.

It is very true that he may find it a troublesome remedy. But he has it. And it was on the faith of that remedy, on the faith of the tax provided by the act of Feb. 10, 1853, and of the legal remedies to enforce the tax, that he purchased his bonds. That was his security, and by that he must abide, even if it prove to be a doubtful security.

It was said below, that a remedy at the mercy of the debtor, is no remedy at all. Without inquiring into the philosophical truth of that remark, it is enough to say that on the faith of that remedy, and of that alone, the complainant invested his money in these bonds.

Though a municipal corporation of the lowest order, this town is one of the machineries by which the sovereignty acts. Hallam ascribes much of the freedom of modern civilization to municipal corporations. They are an essential part of the State. They are a fractional integer of the United States. Their debt is part of the public debt. And the public debt rests mainly on the public faith. Whoever deals in it, credits the public faith, at his own risk.

And equity will not devise a new ground of jurisdiction, to enforce a cruel remedy, because a speculator in public faith is unlucky in his legal remedies.

It was also argued below, that the remedy sought by the bill was independent of state laws, as all remedies on federal judgments, it was said, ought to be. The remedy sought is as independent of federal, as of state laws. But the misfor-

tune of the argument is, that the court below has provided by rule, as by the act of Congress of 19th May, 1828, it had the power to do, that "when not otherwise directed by the laws of Congress, writs of execution, and the manner of proceeding thereon by the marshal, shall be as prescribed by the laws of Wisconsin."

It was also said in this connection that the remedy would not be oppressive, because the defendants could relieve themselves from it, by simply levying a tax to pay the judgment. We suppose the court will take judicial cognizance of the last federal census, so far as to know that eight persons are not a majority of the legal voters of the town of Beloit.

SAMUEL C. MORGAN,
Appellant,
vs.
THE TOWN OF BELOIT, and
THE CITY OF BELOIT.
No. 281, Dec. T., 1868.

This is an appeal from the decree of the court below, dismissing the bill, upon demurrer. The bill states the act of Feb. 10, 1853 : the subscription of stock and issue of bonds : the act of March 31, 1856, incorporating the city of Beloit, within the limits of the town : an election, as provided in the last act, in favor of becoming a city under that act : the act of March 3, 1867, amending the city charter : the recovery of several judgments on coupons of the bonds, by the complainant, in the court below : the amount of the assessment roll of the town and city, for the several years in which the coupons matured, and the proportion in which the coupons should be paid by the city and town respectively : and that the city and town ought to pay interest on those amounts from the rendition of the judgments, and to pay each one-half of the costs of the judgments ; and concludes with this prayer :

"To the end, therefore, that the defendants may, if they can, show why your orator should not have the relief hereby prayed, and according to the best and utmost of their several and respective knowledge, information, recollection and belief, full, true, direct, and perfect answer make, to all and singular the matters and things hereinbefore set forth : and that your orator may have such other and further relief, as the nature of his case may require, and as shall be agreeable to equity and good conscience ;" and the prayer for process.

I.

The omission of any prayer for special relief is fatal to this bill. Were it not for this appeal, we should suppose the omission to be a clerical mistake.

There are, indeed, a few cases holding the dangerous and inconvenient rule, that a prayer for general relief is sufficient; and that the special relief may be prayed for at the bar, on hearing. But, even under that rule, the bill must indicate by its frame the special relief sought, which this bill does not.

Is this bill framed for a declaratory decree of the proportions in which the judgments should be paid by the city and town, leaving the plaintiff to his *mandamus*, to enforce a tax accordingly? Or is the bill framed for a decree awarding execution against the defendants? Or is the bill a confession that our plea in abatement, of the non-joinder of the city, in the actions at law, was well taken, and an effort to establish the liability of the city, after judgment at law, by decree in equity?

We do not know. A pleader who frames his bill, with a prayer for general relief only, even when permitted, does a bold act, and is bound to do it skilfully.

But this court has wisely abrogated the rule, that a bill *may* be framed with the prayer for general relief only. The 21st rule given by this court to the federal courts of equity, which is also the 21st rule in order of the court below, provides that "the prayer of the bill *shall* ask the special relief to which the plaintiff supposes himself entitled, and also shall contain a prayer for general relief."

Had the bill prayed any special relief, pertinent to the case made by the bill, the court might have granted any cognate relief, under the prayer for general relief. But under the prayer for general relief only, this court, under its own most judicious rule, can grant no relief whatever. The prayer for general relief must be accompanied by a prayer for special relief; a prayer for general relief only, is, under the rule, no prayer at all.

And this bill stands as a bill without any prayer, except the prayer for process ; and is clearly demurrable.

We refer, if reference be necessary, on this subject, to *Story's Eq. Pl.*, *Sec.* 42, 453, and *Lube's Eq. Pl.*, 285.

II.

Aside from the defective frame of the prayer, we do not sufficiently comprehend the scope of the bill, to argue other objections in detail. As far as we understand it, we have stated other objections to it in the brief submitted in No. 108.

THE UNITED STATES, Ex Rel.
SAMUEL C. MORGAN,
Plaintiffs in Error,
vs.
EGBERT GATES, Town Clerk of the town of Beloit.

No. 118, Dec. T., 1868.

This is a writ of error from an order of the court below, (*Record*, 42,) vacating another order of the court, to show cause why a writ of peremptory *mandamus* to the defendant in error, should not issue. (*Record*, 39.)

The return of the clerk of the court below embraces the record of the judgment at law, and this proceeding as growing out and forming a part of it. The proceeding itself commences on page 24, of the printed record.

The relator filed his petition, June 3, 1867, in the court below, stating a judgment recovered against the town of Beloit, which remained unpaid; that, August 4, 1866, he filed in the office of George Morse, then town clerk of the town, an exemplification of the judgment, with an affidavit that the judgment was in force and unpaid; that the judgment had not been assessed by the town clerk for taxation, although since the record was so filed, a tax had been assessed and collected; and that the defendant in error was the present town clerk.

This petition was verified, and accompanied by a notice, Aug. 1, 1866, to the town clerk to assess the amount of the judgment, in the tax roll of the town; by a transcript of the record of the judgment, attached as an exhibit to the notice; by an affidavit that the judgment was in force and unpaid, attached to the notice as an exhibit; by an affidavit of service, Aug. 4, 1866, on George Morse, town clerk; and by an affidavit that, Dec. 27, 1866, George Morse, then town clerk, stated to an agent of the relator, that he had not assessed the judgment, and had done nothing in regard to it.

Thereupon the court below made its order, that the defendant in error show cause why a writ of peremptory *mandamus* should not issue to him and his successors, to assess the amount of the judgment in the next town assessment, to be paid on the judgment; or why the writ should not issue in some other form.

This order was properly served; and afterwards the relator gave notice of a motion to amend his papers, by adding an affidavit that at the last town election, a certain person was elected chairman, and two certain persons supervisors, who both neglected to qualify; and that since the decision of the court below, that *mandamus* could not issue to the supervisors, in the premises, there had not been a board qualified to act; two being annually elected with the understanding that they should not qualify, for the purpose of not having a board. Afterwards, motions were made by the town and by the defendant in error, to vacate the order to show cause of June 3, 1867. The motion of the latter assigns the reasons on which it proceeds: 1, because the application shows no reason why the relator does not follow the remedies of the act of Feb. 10, 1853; 2, because the application shows no demand upon the defendant in error, and no refusal by him; 3, because the relator is bound to pursue the remedies of the act of Feb. 10, 1853; and the application does not show that such remedies have been exhausted, and failed.

Upon hearing the motion, the court below ordered that the order of June 3, 1867, be, and the same was, thereby vacated.

And this is the order to which the writ of error goes.

All these proceedings are entitled, in the action at law, in which the judgment was recovered: *Samuel C. Morgan vs. The Town of Beloit.*

I.

This is not a final judgment, to which a writ of error will lie in this court.

It is true that the court has held that the proceeding of *mandamus*, in the circuit and district courts, is an action, in which the judgment may be brought to this court by writ of error.

1. But there is no such *action* here. The relator saw fit to file his petition, and take his order, in the action at law in which he recovered his judgment, as an interlocutory proceeding therein, after judgment. It was not until after the order to which the writ of error is prosecuted, that it seems to have entered into the mind of the relator, that this was a separate action. Then, for the first time, we hear of the *United States, on the relation of Morgan vs. Gates*. Before, all the proceedings were in *Morgan vs. Beloit*.

And this was the plain understanding of all the parties at the hearing below. The defendant in *Morgan vs. Beloit*, moved to vacate, as well as the defendant in error. And it was on the motion of the defendant in *Morgan vs. Beloit*, and not of the defendant in error, that the order was granted.

Here is a defendant in error, in whose favor no judgment was rendered, brought here to defend an order granted to another party. If error lie on the order, the town of Beloit is the proper defendant in error.

It is submitted that the whole proceeding is void, because it was taken in another action, when it should have been a separate action. It is as if the relator had proceeded on his bonds in debt; and after judgment, proceeded in the same record, without any separate suit, to assess damages on his coupons in assumpsit.

If there be no action here, there could not well be a final judgment to which a writ of error would lie.

2. And there is no judgment in form. The whole proceeding is consistent with itself, as an interlocutory proceeding, in the action in which the judgment was rendered. And

it properly ends, not with a judgment denying the prayer of the petitioner, and that the defendant in error recover his costs ; but with a simple interlocutory order, vacating another interlocutory order, in *Morgan vs. Beloit*.

Error will not lie to this. *Wilson vs. Daniel*, 3 *Dallas*, 40. *Canal Company vs. Union Bank*, 8 *Peters*, 259. *United States vs. Girault*, 11 *Howard*, 22. *Van Ness vs. Van Ness*, 6 *Howard*, 62. *Brown vs. Wiley*, 4 *Wallace*, 165.

II.

The *mandamus* was prayed for to enforce the collection of a tax, to satisfy a judgment recovered on coupons of bonds issued under the act of Feb. 10, 1853, discussed in No. 91, at this term.

Under that act, Sec. 3, it is provided that the supervisors, whenever necessary, shall annually levy a tax to pay the interest on the bonds.

By the general law regulating towns, R. S., Chap. 15, Sec. 78, this is the mode provided for the payment of judgments against towns. An exemplified copy of the judgment, with an affidavit that the judgment is in force and unpaid, is to be filed in the office of the town clerk ; whereupon it is the duty of the town clerk to assess the amount on the next town assessment and tax roll, in a separate column, and the same is to be collected like other taxes, and paid to the proper party.

This latter is the proceeding which the relator has seen fit to take.

His proper remedy is by *mandamus* to the supervisors, whose duty it is to levy the tax under the act authorizing the issue of the bonds ; and not under the general provision relating to other judgments. This has been so held, by the Supreme Court of the State, and by this court. *State vs.*

Beloit, 20 *Wis.*, 79. *Knox Co. vs. Aspinwall*, 24 *Howard*, 376. *Van Hoffman vs. Quincy*, 4 *Wallace*, 535. *Walkley vs. Muscatine*, 6 *Wallace*, 481.

This is not a case of alternative remedies, of which the relator has an election. He can have but one payment, levied by one tax, once assessed. And if it be the duty of the supervisors to levy the tax, it cannot be the duty of the clerk. The special act providing for the special tax, to pay these special liabilities, to be levied by the supervisors, takes this judgment out of the general act, providing for the assessment of a tax by the clerk, to pay other judgments against towns.

And this view is, perhaps, strengthened by the language of Chap. 15, R. S. Sec. 77 provides that no execution shall issue on any judgment against a town. Sec. 78 provides for the payment of any judgment, rendered by any court of this State.

And the relator should have applied in the court below for *mandamus* against the supervisors, and not against the clerk.

III.

If the application were properly against the clerk, it is improperly made.

There must be a demand and refusal, previous to the application for the writ. *Tapping on Mandamus*, 5, 82, 282, 283. And it must be a demand made *personally*, to him from whom the duty is required. *Ib.*, 283–4.

Here the record was filed with a predecessor of the defendant in error; and there is no manner of proof that it ever came to his possession or knowledge. A demand accompanied the record; but it was a demand to levy the tax at the *next* town assessment, when the defendant in error was not in office. The demand was made August 1, 1866. The next assessment roll was made in December, 1866. *R. S., Chap.*

18, *Sec.* 60. And the defendant was elected in April, 1867. So that, even on the violent assumption that the judgment record and the demand bound the defendant in error, he could not possibly have done the thing specifically demanded.

If there be fault in this, it is the fault of the relator in framing his demand.

There was no personal demand made to the defendant in error, and no demand made to his predecessor, with which the defendant in error could have complied.

And even if this were otherwise, there was no refusal by the defendant in error.

The application for the writ was made June 3, 1867. No tax could be levied till December, 1867. So that there is no implied refusal, if implied refusal would be sufficient. And there is no evidence tending to show any refusal, or intent of refusal, on the part of the defendant in error.

The application should have been made, if against the clerk at all, against the defendant in error's predecessor, upon his failure to assess the amount of the judgment in 1866.

This point is not passed upon in *Soutter vs. Madison*, 15 *Wis.*, 30. The point there decided was, that, where some members of the council had changed after alternative *mandamus* served, that was no objection to the peremptory writ. That we suppose to be true; but that does not overrule the general principle, that demand and refusal must precede the alternative writ, of and by the very person to whom the writ is to go.

IV.

The application for the writ does not set out any failure of the board of supervisors to levy the tax, or any failure of *mandamus* directed to them. It is true, that such an application is in the printed record. But that could aid this application only upon the principle, that both applications are interlocutory proceedings in *Morgan vs. Beloit.*

So that, if this be a good application, it is unaided by the fact that the supervisors have failed to levy the tax, or that there is any difficulty in compelling them to do so. *Non constat* that the supervisors had not levied the tax, or are not perfectly willing and competent to do so upon demand, or are not in a position to be compelled to do so.

For these reasons the application of the relator was properly refused by the court below

H. L. PALMER.
E. G. RYAN.

Supreme Court--United States.

No. 17 Dec. Term 1869.

SAMUEL C. MORGAN,

vs.

THE TOWN OF BELOIT,
SIMON RUBLEE and others.

BRIEF FOR COMPLAINANTS ON RE-ARGUMENT.

Power of Circuit Court of the United States to levy a tax to pay Municipal Bonds.

MATT. H. CARPENTER,
Complainants' Counsel.

J. H. YEWDALE, Law Printer, Milwaukee.

SUPREME COURT OF THE UNITED STATES.

No. *Dec. Term* 1869.

SAMUEL C. MORGAN,

vs.

THE TOWN OF BELOIT, SIMON RUBLEE and others.

To argue the question propounded by the court, it will be proper to premise, briefly, the facts of this case as shown by the record.

February 10, 1853, the Legislature of the State of Wisconsin, authorized the Town of Beloit, the defendant, subject to the result of an election to be held under the act, to subscribe one hundred thousand dollars to the capital stock of a certain railroad, and pay for the same in the bonds of the town, payable in twenty years. The act further provided a follows :

"SECTION 3. The Board of Supervisors of the Town of "Beloit, *whenever the same shall become necessary*, shall "*annually* levy a tax upon the taxable property of said "town, sufficient to pay the interest upon such bonds, "after deducting the dividends due to such Town on "said shares of stock."

The Town, in pursuance of the power conferred by the act, subscribed for the stock and issued its bonds in payment. The complainant received judgement on the coupons attached to certain of said bonds; and procured a peremptory writ of *mandamus* against the Supervisors of the town, commanding them to levy a tax to pay said judgment. But the legal voters of the town have for several years elected persons unfriendly to the tax, who refuse to qualify, so that there has been no Board of Supervisors of the town to execute the writ; and of course that remedy fails.

When these bonds were issued, there was no statute of the State, nor rule of the United States Court for that district, in regard to the collection of judgments against towns; *and the common law was in force.* In 1857, the Legislature passed an act which was embodied in the Revision of 1858, as follows: (R. S. 1858, p. 186.)

Chap. 15, Sec. 77. "No execution shall issue on any "judgment against a town, nor shall any action be "brought thereon; but the same shall be collected in the "manner hereinafter provided in this chapter.

"Sec. 78. Whenever an exemplified copy of any final "judgment, *rendered by any court of this state*, against any "town in this state, together with an affidavit of the "plaintiff in such judgment, his assigns, or his attorney, "stating that said judgment has not been reversed, ap- "pealed from, or removed to any other court, or paid, or "satisfied in whole or in part, shall be filed in the office "of the town clerk of the town against which such judg- "ment may have been rendered, it shall be the duty of "the town clerk with whom the certificate of the judg-

" ment as aforesaid shall have been filed, to proceed to " assess the amount thereof, with interest from the date " of such judgment to the time when the warrant for the " collection thereof will expire, upon the taxable prop- " erty of said town, placing the same on the next town " assessment and tax roll, in a separate column; and the " same proceedings shall be had thereon, and the same " shall be collected and returned in the same manner as " other town taxes, and shall be paid to the party enti- " tled thereto."

And in 1867, the Legislature amended this act as follows:

Chap. 153, " Sec. 1. Section *seventy-eight* of Chapter " 15 of the Revised Statutes entitled, ' of towns and town " officers; powers and duties of towns,' is hereby amend- " ed by adding to it the following proviso, viz: '*provided,* " *however,* that the town clerk *shall not perform the duties* " prescribed in this section, when said judgment shall " exceed one thousand dollars, *until first authorized by the* " *qualified electors of such town* at some legal town meeting; " *and it is hereby declared that the said section is not applica-* " *ble to any judgment rendered by the Circuit or District* " *Court of the United States for the District of Wisconsin.*"

The rules of the Circuit Court of the United States for that district provide as follows :

" Suits by replevin or other process not specified in " these rules, shall be commenced *and proceeded in* as " regulated *at the time,* by the laws of the state, subject " to the rules of process and pleadings in this court.

That is, a judgment rendered by a state court not exceeding one thousand dollars, may be collected by a tax

to be levied by the town clerk. But if the judgment *exceeds that sum*, it cannot be collected without the consent of the defendants, the inhabitants of the town. And according to the statute, and rule adopting any statute in force "at the time" the proceedings are to be taken, a judgment rendered by the Circuit Court of the United States, whether more or less than one thousand dollars, cannot be collected at all, *even with the consent of defendants.* No execution can issue, and no tax can be levied.

Of course the act of 1867 is unconstitutional, even as applied to judgments rendered in the state courts on contracts made prior to the passage of the act; and although nothing can be more harmless than this attempt of the state to deny to judgment creditors in the United States Court, the remedies given by the act of Congress, which for that purpose *makes the statutes of the state its own*, and gives to them the sanction of federal authority. Nevertheless, it illustrates the absolute necessity of a federal judiciary to preserve the inviolability of unpleasant contracts; and proves that any remedy on these bonds, which is subject to state control, is worthless to the creditor. And a levy of the tax by the town clerk, to be proceeded with by other state officers not mentioned in the act of Congress, and by methods *fixed only by state laws*, and therefore subject to state control and amendment, *is no remedy at all.*

In *Bearsly v. Smith*, 16 *Conn.*, 376, speaking of the public duties of towns, the court say:

"In the performance of these (duties) they must con-
" tract debts and liabilities, which can only be discharg-
" ed by a resort to individuals, either by taxation or ex-
" ecution. *Taxation, in most cases, can only be the result*
" *of the voluntary action of the corproation* dependant upon
" the contingent will of a majority of the corporators,
" *and upon their tardy and uncertain action. It affords no se-*
" *crity to creditors, because they have no power over it.* Such
" reasons as these probably operated with our ancestors,
" in adopting *the more effectual and certain remedy,* which
" has been resorted to in the present case, [levy up-
" on the private property of an inhabitant,] *and which*
" *they had seen to some extent in operation in the country whose*
" *laws were their inheritance.*"

The officers of the town who are to levy this tax, are controlled by the inhabitants, the electors of the towns ; and it is thus in their power at all times to prevent a levy and collection of the tax ; as they have done for more than twelve years, in this instance.

The case therefore comes to this:

(1.) That process at law, or suit in equity, must make the amount of the judgment out of the private property of some of the inhabitants, leaving them to enforce contribution as best they can; or

(2.) The Circuit Court must levy and collect the tax provided for by the act under which the bonds were issued; or,

(3.) There is no means of enforcing the judgment.

The bill in this case is exhibited against the town, as a corporation, and against all the inhabitants of the town; the inhabitants being numerous, a few are named as rep-

resenting the whole people; and according to the practice of courts of equity, this is the proper method to bring *all the inhabitants of the town*, in their capacity as corporators, before the court.

Adair vs. The New River Co. 11 *Vesey, Jr.*, 429. And as corporators, they are all before the court when the corporation, the town is brought in.

The case therefore is this:

(1.) The complainant has a judgment against the defendants for over two thousand dollars; upon which no execution can be issued.

(2.) The defendants have real and personal property of the value of more than a million dollars, *within the jurisdiction of the court.*

(3.) The law under which the cause of action arose declares that this property shall be taxed to pay the amount included in the judgment?

And the practical question is, can the defendants under these circumstances, repudiate their contract, set the courts at defiance, retain their property and refuse to pay the judgment?

I.

On the argument at the last term I endeavored to maintain, that by the common law, *which was in force in Wisconsin*, when these bonds were issued and disposed of, and therefore under the decision of this court in Von Hoffman vs. Quincy 4, Wallace, 535, not the subject of legislative repeal; the complainant had a right to satisfy

his judgment out of the *private* property of *any inhabitant* of the town, and relied upon the following authorities:

2 *Kent Com.*, 274.
Ang. & *Ames on Corp.*, *Sec.* 629.
Bank vs. Cook 4, *Pic.*, 414.
Russell vs. Devon, 2 *Term*, *R.*, 667.
Riddle vs. Locks, &c., 7 *Mass.*, 187.
Hawks vs. Kennebeck, 7 *Mass.*, 462.
Adams vs. Bank, &c., 1 *Greenl.*, 361.
Attorney General vs. Exeter, 2 *Russ.*, 83.
Chase vs, *Bank*, 19 *Pick.*, 568.
Beardsley vs. Smith, 16 *Conn.*, 368.
King vs. Inhabitants of Woburn, 10 *East.*, 395.
King vs. Inhabitants of Hardwick, 11 *East.*, 577.

II.

The question upon which this cause has been set for re-argument is as follows :

"Whether or not, it is competent for the Circuit Court "of the United States, on a bill filed for the purpose, to "appoint a master or commissioner to levy and collect "a tax, under and in pursuance of the third section "of an act passed by the legislature of Wisconsin, "February 10th, 1853, upon the taxable property of the "town, sufficient to pay the judgment of the plaintiff, "in case of a refusal of the Supervisors of the town to "levy the same, after service of a peremptory writ of "mandamus."

The power of the Circuit Court to levy such tax, may be sustained upon either of the following elementary principles in the jurisprudence of equity.

(1.) Where the complainant has a clear, definite and adjudicated legal right, but is without a remedy in the courts of the common law, a court of equity will furnish a remedy.

(2.) Where the law professes to give a remedy, which by some accident is rendered unavailable, a court of equity will furnish an adequate remedy.

(3.) Where a creditor has obtained a judgment and exhausted all legal remedies, a court of equity will compel satisfaction of the judgment, out of any property or funds, rights or credits, legal or equitable, which ought to be applied to the satisfaction of the debt, but cannot be reached by execution at law.

Hargrave's Law Tracts, Part 2, Chap. 2, p. 334, says:

"And because it hapeneth many times, that some man "that hath right to evidences that be in another man's "hand, and that neither he under lock nor seal cannot "show the very certainty how many deeds there be, or "if it be but one deed, yet because he cannot tell the "name of him that made the deed, nor of him to whom "it was made, nor peradventure the certainty of the land "comprised therein, nor all the towns names wherein it "lieth, *wherefore he is without remedy by the course of the common* "*law*; there it hath been thought reasonable in times past "that a subpœna should lie *for him that hath right*, and "rather to suffer him *to have right there*, than to leave him "*without remedy in all places*. And this is one of the "most common cases where a subpœna hath been sued

"in times past. And here it is to be noted that it is not "against the common law; though the party have reme- "dy in the chancery in the said case, though he can "have none by the common law. For the common law "doth not prohibit, but that there shall be remedy in the "chancery in the said case, and other like; *and if it did*, "it would be hard to prove that prohibition were reason- "able. Wherefore, the reasonableness of the law doth "suffer it, rather than it would break his rules and "grounds, and to suffer the plaintiff to have an action, "and could not declare nor show whereof he brought his "action."

Mitford's Pleading, 115. "Where an *act of parliament* "has *expressly given a right*, the courts of ordinary juris- "diction have been found incompetant to give, in all "cases, a full and complete remedy, and the courts of "equity have therefore interposed. * * Where *par- "ties by contract have given a right*, but have not provided "a sufficient remedy, the courts of equity have also in- "terfered."

Mitfords pleading, 117. "Relief has also been given "where a remedy at law was originally provided, but "by subsequent accident could not be enforced; as where "by confusion of boundaries of lands, remedy by distress "for rent was defeated. So if the remedy afforded by "the ordinary courts is incomplete, a court of equity "will lend its aid to give a complete remedy."

1 Fonblanque, Eq., 156. "Where there is no remedy "at law, *equity will certainly grant one*, * * for "where there is a right, there ought in equity, to be a "remedy for it."

1 Story Eq., Juris., sec. 33 "Perhaps the most gen-"eral, if not the most precise discription of a court of "equity in the English and American sense, is, that it "has jurisdiction in cases of rights recognized and pro-"tected by the municipal jurisprudence, *where a plain ade-"quate and complete remedy cannot be had in the courts of "common law*. The remedy must be *plain*, for if it be "doubtful and obscure at law, equity will assert a juris-"diction. It must be *adequate*; for if at law it falls "short of what the party is entitled to, that founds a "jurisdiction in equity. And it must be complete; that "is it must attain the full end and justice of the case. "It must reach the whole mischief, *and secure the whole "right* of the party in a perfect manner, at the present "time and in future; otherwise equity will interfere, and "give such relief and aid, *as the exigency of the particular "case may require*.

In Bond v. Hopkins, 1 *Sch. and Lef.*, 429, Lord "Redesdale says: "Nothing is better settled in the courts "of equity, than that where a title exists at law, and in "conscience, and the effectual assertion of it at law is "unconscientiously obstructed, relief should be given in "ty; and that when a title exists in conscience, though "there be none at law, relief should, also, though in a diff-"erent mode, be given in equity."

In Boyer v. Grundy, 3 Pet., 215, the Court say: "It is "not enough that there is a remedy at law; it must be "plain and *adequate*, or, in other words, as practical and "efficient to the ends of justice, *and its prompt adminis-"tration* as the remedy in equity."

See also to same point:

Mitford's Pleadings, 25.

Weymouth v. Boyer, 1 Ves. Jr., 416.

Rathburn v. Warren, 10 John., 587.

King v. Baldwin, 17 John., 384.

Bank v. Lee, 11 Conn. 121.

Ins. Co. v. Fish, 1 Page, 90: "Whenever the remedy "at law is doubtful and difficult, a Court of Chancery "has jurisdiction."

See also, Whitlock v. Duffield, 2 Ed. Ch., 366. In Barnes v. Lloyd, 1 How. Miss., 584, the Court by Sharkey, C. J., say: "His (the plaintiff's) remedy being *more* full "and complete in equity, affords a good ground for re- "taining the bill."

In *Brown v. Brown*, 1 *Barb. Ch.*, 217; the court says: "It is sufficient to say, that where this court interferes "in special cases," &c., "it proceeds upon the principle "that whenever there is a right, there ought to be a rem- "edy, either in this or some other tribunal. *And where* "*no remedy exists elsewhere to enforce the right, this court will* "*furnish such remedy*, whenever it is necessary to prevent "a total failure of justice; where the property in con- "troversy, or the person of the wrong doer, is within "the jurisdiction and control of the court."

In Frances Maxims in Equity, page 24, folio Edition, under "MAXIM VI. EQUITY SUFFERS NOT A RIGHT TO BE "WITHOUT A REMEDY;"

Many of the older cases are collected. It is said in the note, "The rights here intended are those which the law "acknowledges to be such; and never gives judgment

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"against them, *though it cannot give a remedy for them*; and "not equitable rights for which equity gives a remedy "in the very creation of them." And the following among many other instances are cited in support of the maxim as explained by the note.

"A court of equity will compel the Lord of a manor "to admit the tenant. *Toth.* 2, 3. As, if the Lord will "not hold a court, equity will compel him; Car. Rep. "4: for an action on the case will not lie against the "Lord, and there is no remedy but in Chancery. *Cro.* "*Jac.*, 368. So if an erroneous judgment be given in a "copyhold court, in a *Formedon*, or the like, a Bill may "be exhibited in Chancery to reverse it. 1 *Rol.* 373, *Pl.* 2; "Although the King was Lord of the manor. *Lane* 98. " * * A purchaser of a reversion shall compel the "Lessee in Chancery to attorn, where he hath no means "to compel him by the common law; for the grantee "hath no remedy, as the conusee of a fine, to enforce an "attornment. 1 *Roll.* 377, *Pl.* 12.

Edgell v. Haywood, 3 *Atk.*, 352, was the case of a person, "who had been discharged under an act for relief of insolv- "ent debtors, by which his future effects were made liable "to the demand of his creditors, but his person was pro- "tected; the Court of Chancery, exercising its extraor- "dinary jurisdiction, enforced a judgment of a court of "common law against his effects, which were so circum- "stanced, as not to be liable to execution at the common "law." *Mitford, Pl.*, 115.

In *Plunket vs. Brereton*, 1 *Rep., Ch.* 5, "where rent was settled upon a woman by way of jointure, but she had no

power of distress, *or other remedy at law* ; the payment according to the intent of the conveyance was decreed in equity."

In all these cases the relief was granted upon the ground that the party had a right *and no legal remedy*. To the same effect see

Duke of Leeds, v. Powell, 1 *Vesey,* 171.
Cooke v. Smede, 2 *Brown, Par. Cases,* 184.
Fells v. Reed, 3 *Vesey* 70.
Macclesfield v. Davis, 3 *Ves. & B.,* 16.
Withey v. Cottle, 1 *Sim. & St.* 174.
Adderly v. Dixon, 1 *Sim.* & *St.* 607.

It is upon this principle that judgment creditors, who have exhausted their remedy at law, are permitted to come into a court of equity and reach any property, which in good conscience, ought to be applied in satisfaction of the debt, and that too, without any statute upon the subject.

Hadden vs. Spaden, 20 John, 554.
Hendricks vs. Robinson, 2 John, Ch. 296.
Curran vs. Arkansas, 15 How. 306.

The principle of these authorities controls this case.

1. The complainant has *a clear right* given him by his contract and the statute which forms a part of the contract, to have the taxable property of the town laid under contribution to pay his debt. This right is protected to him by the constitution of the United States, and the State Legislature cannot impair it; *Von Hoffman v. Quincy,* 4 *Wallace,* 535; and he has no legal remedy to enforce his right.

2. The act and the contract, professed to give a remedy by taxation to pay this debt; but by the wrongful act of the defendants,—the inhabitants of the town—this supposed remedy fails.

3. The complainant has a judgment which ought to be satisfied out of, by law is made a charge upon, certain property within the jurisdiction of the court; and has exhausted his remedy at law, without reaching the property or obtaining satisfaction of his debt.

The complainant's case falls therefore,into each of three classes where courts of equity are bound to interfere ; (and to quote from 1 Story Eq Juris. Sec., 33,) "*give such remedy as the exigency of the particular case may require.*"

Now what remedy does the exigency of this case require? Manifestly, that the complainant should have the substantial benefit he is entitled to by his contract, and the statute upon which the contract is based; that is, that his debt should be made out of the taxable property of the town by an assessment *pro rata,* upon such property. If this right cannot be enforced by the judicial department of the federal government, then the perfection of our system has been greatly overrated. This is a case clearly within the jurisdiction of the federal judiciary. It is a controversy between citizens of different states. The complainant is entitled to have his debt made out of property, which is *adequaten* and *within the jurisdiction* of the court.

What then is the difficulty? It is answered that courts cannot levy taxes. Well suppose we drop the startling word *tax,* and simply say:

(1.) The act and the bond create a lien or charge upon all the taxable property of the town, to be satisfied by a *pro rata* assessment upon the property.

(2.) The Circuit Court of the United States as a court of equity, has full power to enforce this lien; to ascertain the amount due; declare it a lien upon the property, and order that unless payment be made of the proper proportion by each tax payer within a time to be fixed by the court, the property shall be sold to satisfy the lien.

This would exactly state the case, and give the complainant satisfaction of his debt, without introducing any startling phrases into the drowsy vocabulary of chancery, or alarming any man's fears for state rights. It makes very little difference in this country *what is done!!!* But it is vastly important that it should be expressed in innocent and familiar speech!!!

Nothing is more usual in courts of equity than the ascertainment of equitable liens and legal incumbrances, and the enforcing of them against particular property or special funds. No one could object to the courts doing this in the present case; although manifestly to do so would be *to levy a tax*, when *names* are dropped and *things* considered. A tax is a pro rata assessment upon persons or property within a state, county, town or other district of country, by competent authority for a legal purpose.

Therefore, if it will sooth any man's fears, let us say, that this court cannot levy a tax under the third section of the state law in question; but that the third section of this act and the bonds issued under the act, created a lien upon the property, to be satisfied *pro rata*; and

that the Circuit Court of the United States, as a court of equity, has jurisdiction to ascertain, declare and enforce this lien by a sale of the property under a decree for that purpose. This will *satisfy* everybody ; *and the complainants judgment also.*

Any substantial right given by state laws, may be enforced by the federal courts in cases between parties competent to sue in the federal courts.

Clark vs. Smith, 13 *Peters,* 195, 203.

*Guin vs. Breedlove,*2 *How.* 29.

Knox Co. vs. Aspenwall, 24 *How.* 376.

The act and the bond issued under it create a charge upon the taxable property of the town.

When a creditor has a legal right to be satisfied out of a particular fund or piece of property, this right constitutes a lien or charge on the fund or the property; and it makes no difference whether this right is given by statute, by the common law, or by contract between the parties By the general principles of law, creditors of a corporation are entitled to be satisfied out of the assets before they are distributed among stockholders. Hence the assets are said to constitute a trust fund for the payment of the debts. *Curran v. Arkansas* 15 *How.* 306. Here the act and the contract charge the taxable property of the town with the amount of this debt. Taxation is only a remedy for the enforcement of this right. This remedy the statute proposed to give; but for the reason before stated, it becomes unavailable to the creditor. The failure of the remedy does not take away the right of the creditor to make his debt out of the property. The

property, therefore, *is a trust fund* for the payment of the debt; and a court of equity can enforce the lein against the property; and it can fashion its decree to meet "*the exigency of the case.*" That is, it can determine how much ought to be paid by each owner of personal and real property, upon the property owned by him; as shown by the assessment roll of the town,and provide that if the amount be not paid within a fixed time, it shall be made out of any other personal property of the delinquent, or out of the real estate charged with the debt. All this is perfectly familiar to courts of equity; and it is in substance levying a tax upon the property.

MATT H. CARPENTER,
Of Counsel for Complainant.

Miller Aug 23 1869

SUPREME COURT OF THE UNITED STATES.

December Term 1868.

No. 108.

SAMUEL C. MORGAN,

Complainant and Appellant,

vs.

THE TOWN OF BELOIT, SIMON RUBLE and others.

Brief for Appellant.

MATT H. CARPENTER,

Counsel.

J. H. Yewdale, Law Printer, Milwaukee.

SUPREME COURT OF THE UNITED STATES.

December Term 1868.

No. 108.

SAMUEL C. MORGAN,

Complainant and Appellant,

vs.

THE TOWN OF BELOIT, SIMON RUBLE and others.

This is an appeal from the Circuit Court of the United States for the District of Wisconsin, sustaining a demurrer to the bill of complaint and dismissing the bill.

ABSTRACT OF THE BILL.

1. That ,the Legislature of Wisconsin in A. D. 1853, passed an act authorizing the Town of Beloit to subscribe for stock, and isssue $100,000 Bonds, in aid of a railroad from the village of Racine to the city of Beloit ; provided a majority of the votes should so determine at an election, &c.

The act is set out in full.

"Sec. 3. The Board of Supervisors of the town of

"Beloit, whenever the same shall become necessary, "shall annually levy a tax upon the taxable property of "said town, sufficient to pay the interest upon such "bonds, after deducting the dividends due to such town "on said shares of stock."

That the election was duly notified and held; the result was in favor of issuing the bonds; and the Board of Supervisors thereupon subscribed for said town, for $100,000 stock in the Racine, Janesville and Mississippi Railroad Company, and issued the bonds of the town to that amount, in payment therefor, as authorized by said act; with coupons attached for interest on said bonds, in the usual form; copy of the body of one of each kind of the bonds attached, as exhibit to the bill; that the railroad company immediately thereafter, sold the bonds and coupons attached, except the coupon maturing in February, 1854, and said bonds and coupons have since passed from hand to hand in market.

II. That afterwards, on 9th January, 1860, the complainant being a *bona fide* holder of certain of said coupons, recovered judgment thereon in District Court of the United States for this district, for $1,540, debt, and 25.74 costs.

That said judgment was duly docketed, remains in full force, is unpaid, the bill filed in good faith, &c., &c.

III. By the laws of the State, &c., no execution can issue on said judgment.

IV. That the Board of Supervisors of said town have never levied a tax to pay any part of the interest maturing on any of said bonds, nor to pay said judgment; that the railroad company has never made any dividend on said stock; that said company has for years been utterly insolvent, and there is no source from which payment can be made, except by levying a tax, as the town, and its several supervisors, have known for years; but the town has made no provision for paying said judgment.

V. January 16, 1862, complainant applied to, and obtained from said District Court, a peremptory writ of mandamus against the Board of Supervisors of said town, commanding said Board to immediately levy a tax to pay said judgment; caused the same to be duly served, &c., and it remains in full force.

January 12, 1863, complainant moved this Court, on the law side thereof, for an attachment; which was refused, for the reason that all said supervisors, except one, had resigned.

May 7th 1863, this Court granted a rule on a newly elected Board of Supervisors commanding them to show cause on second Monday June, 1863, why peremptory writ of mandamus should not issue, &c; and on the 23d June,

1863, this rule was discharged, because two of Supervisors had *again* resigned.

VI. August 4, 1866, complainant caused transcript and exemplification of the record of said judgment, together with an affidavit stating that said judgment had not been reversed, &c., to be filed in the office of the Town Clerk of said town, and demanded that he should proceed to levy a tax to pay said judgment, which he refused to do.

VII. That the remedy by mandamus is not an adequate, convenient, or efficacious remedy : that by the law of the State, the Town Clerk and Board of Supervisors are elected annually, that the tax for the payment of said judgment can only be levied on one certain day in in the year, that it cannot be known before that day, that the officers will not do their duty in the premises ; and after that day it is too late to compel them to discharge their duty ; and so the complainant is wholly without adequate remedy in the premises by the strict course of the common law, &c.

VIII. That the inhabitants, for the purpose of evading payment of said judgment, &c., have combined together to prevent there being any Board of Supervisors of said

town ; that every year they elect a full Board, with an understanding with those elected that two of them will not qualify ; and that there has been no legal board qualified to act for several years ; and the bill sets out the several boards elected in different years, and the persons who refused to qualify after each election ; therefore the remedy by mandamus is useless.

IX. That all said defendants, except the town, are residents, inhabitants, voters and property owners and tax payers of said town.

That Simon Ruble owns real estate, (describing the same.)

That A. R. Peck—same.

And so on, with other defendants.

That said real estate, described as aforesaid, is of value exceeding said judgment.

X. That the inhabitants of said town, other than those named as defendants, &c., are very numerous and unknown to complainant ; that it is inconvenient and nearly impossible to make all of said inhabitants parties to this bill ; and complainant prays that he may be excused from so doing ; and that the persons named as defendants, may be taken and held to represent all the tax payers of the town of Beloit, for all the purposes of this suit.

Prayer

1. That the real estate hereinbefore described may be sold at public auction, by the Marshal, &c.
2. General relief.

BRIEF IN SUPPORT OF THE BILL.

These bonds were issued under a private and local act, which was in force from its passage, without publication. *Havemyer v. Iowa County*, 3 *Wallace*. But the act was duly published in the Beloit Journal, as the act itself provided; and this would be sufficient, if it were to be held a general law.

Bushnell v Beloit, 10 *Wis.*, 195.
Clark v Janesville, 10 *Wis.*, 190.

All defences which might have been urged at law or in equity to the coupons on which this judgment was rendered, were cut off and barred by the judgment. The only question therefore is, *conceding the validity of the judgment, can this bill be maintained to enforce its satisfaction?*

IT IS A GENERAL PRINCIPLE IN THE JURISPRUDENCE OF COURTS OF EQUITY, THAT WHEN A PARTY HAS A CLEAR ADJUDICATED LEGAL RIGHT, BUT THE REMEDIES OF THE COURTS OF LAW ARE INSUFFICIENT TO ENFORCE IT, A COURT OF EQUITY MUST FURNISH A REMEDY.

Mitford's Pleading, 103

In Bond v. Hopkins, 1 *Sch. & Lef.*, 420, Lord Redesdale says: "Nothing is better settled in courts of equity, than "that where a title exists at law, and in conscience, and the "effectual assertion of it at law is unconsciously obstruct-"ed, relief should be given in equity; and that when a "title exists in conscience, though there be none at law

"relief should, also, though in a different mode, be given "in equity."

It is upon this principle that judgment creditors, who have exhausted their remedy at law, are permitted to come into a court of equity and reach any property, which in good conscience, ought to be applied in satisfaction of the debt.

Hadden vs. Spaden, 20 John, 554.
Hendricks vs. Robinson, 2 John, Ch. 296.
Curran vs. Arkansas, 15 How. 306

There are three distinct grounds, upon either of which this bill may be sustained :

(1.) The judgment against the town, binds every inhabitant of the town; and as no execution can issue at law, this remedy is properly sought in equity.

(2.) By the law, under which the contracts sued on were issued, it was made the duty of the Town Board to levy a tax; but as there is no board, no tax can be levied, and therefore that remedy at law has failed, and this bill is properly maintainable ; and

(3.) The remedy by mandamus is not an adequate and convenient remedy, and therefore the party might resort to a Court of Equity, *even though no vacancy existed in the Board of Supervisors*. These three points I shall consider in succession.

I.

THE JUDGMENT AGAINST THE TOWN IS AGAINST EVERY INHABITANT OF THE TOWN.

R. S. 1849, Chap. 71, Sec. 1.
R. S. 1858, Chap. 15, Sec. 1.

Provide that "Each organized town shall be a body "corporate, and as such may sue and be sued," &c.

2 *Kent Com.* 274. "Besides the proper aggregate cor- "porations, the inhabitants of any district, as counties, "towns and school districts, incorporated by statute, with "only particular powers, are sometimes called *quasi* cor- "porations. No private action for neglect of corporate "duty, unless given by statute, lies against them as such "a corporation. Having no corporate fund, *each inhabit- "ant is said to be liable to satisfy the judgment,* if the stat- "ute *gives a suit against such community.*"

Angel & Ames on Corp. Sec. 629, after saying that stockholders of *private* corporations *are not* liable for the debts of the corporation, says:

"A very different rule prevails with regard to the in- "habitants of any district, as counties or towns, incorpo- "rated by statute, which come under the head of *quasi* "corporations; for against them no private action will "lie unless given by statue; *and if a power to sue them is "given by statute, each inhabitant is liable to satisfy the judg- "ment.*"

In Merchant's Bank vs. Cook, 4 *Pic.,* 414, the Court say: "Towns, parishes, precincts, &c., are but a collection of "individuals with certain corporate powers for political "and civil purposes, without any corporate fund from "which a judgment can be satisfied, *but each member of the* "community is liable in his person or estate to the exe-

"cution which may issue against the body; each individ-
"ual therefore may well be thought to be a party to a
"suit brought against them by their collective name. In
"regard to banks, turnpike and other corporations, the
"case is different."

In Russell vs. The Men dwelling in Devon, 2 *Term R.* 667, which was an action bronght for injuries received on account of defects in the highway, the Court held that such an action could not be maintained, independent of a statute giving such remedy; and one of the reasons given is: "Now if this action could be sustained, the pub-
"lic would suffer a great inconvenience; *for if damages*
"*are recoverable* against the county, *at all events they must*
"*be levied on one or two individuals*, who have no means of
"re-imbursing themselves, for if they were to bring sep-
"arate actions against each individual of the county for
"his proportion, it is better that the plaintiff should be
"without remedy. However, there is no foundation on
"which this action can be supported, *and if it had been*
"*intended*, the Legislature would have interfered and giv-
"en a remedy, as they did in the case of hue and cry."

This case is cited with approbation by all American writers, and followed by the American Courts. It is everywhere held that no action can be maintained against a county or town, unless authorized by statute; but where an action can be maintained, and a judgment is rendered, no case can be found, it is believed, holding that it may not be levied upon the private property of any inhabitant.

In Riddle vs. Locks, &c., 7 *Mass.* 187, *Parson, C. J.*, delivering the unanimous opinion of the Court says: "We
"distinguish between proper aggregate corporations, and

"the inhabitants of any district, who are by statute in-
"vested with particular powers without their consent.
"These are in the books sometimes called *quasi* corpora-
"tions. Of this description are counties and hundreds
"in England, and counties, towns, &c., in this state. Al-
"though *quasi* corporations are liable to information or in-
"dictment, for a neglect of a public duty imposed on them
"by law; yet it is settled in the case of Russell vs. The
'Inhabitants of Devon, 2 Term Rep. 667, that no private
"action can be maintained against them for a breach of
"their corporate duty, unless such action be given by
"the statute. *And the sound reason is*, that having no cor-
"porate fund, and no legal means of obtaining one, *each*
"*corporator is liable to satisfy any judyment rendered against*
"*the corporation*. This burthen the common law will not
"impose, *except in cases where the statute is an authority,*
"*to which every man must be considered as assenting.*"

See also, *Hawks vs. Kennebeck*, 7 *Mass.*, 462.
Adams vs. Bank, &c, 1 *Green'l* 361.

In Attorney General vs. Exeter, 2 *Russ.*, [*Eng. Ch.*] 83 the Chancellor says: "If a fee farm rent was chargable
"on the whole of the place called Exeter, he who was
"entitled to the rent might have demanded the whole or
"any part of it, *from any one who had a part of or in that*
"*city*; leaving the person who was thus called upon to
"pay to obtain contributions from the other inhabitants,
"as he best could."

These decisions, it will be observed, are not based upon any statute, either in England or in the American States.

In Chase vs. Bank, &c., 19 Pick., 568, the Court review the authorities, and re-affirm the same principle. This case was argued by Mr. Choate on one side and Mr.

Cushing on the other, and the arguments and opinion exhaust the subject. In the opinion, after referring to the authorities, the Court say: "These authorities we con-"sider as conclusive and binding, *whether they be founded "on general principles, or on an analogy between the liabilities "of towns and parishes and hundreds, or upon immemorial "usage.*"

In Beardsley v. Smith, 16 Conn. 368, may be found a very able review of the authorities, English and American; and this doctrine is vindicated as part of the *common law*. The Court say: "We think that the principle is not "of domestic origin, but to some extent was operative "and applied in the mother country, *especially in cases "where a statute fixed a liability upon a municipality which "had no corporate funds.* * * * "That the rated inhabitants of an English parish are "considered as the real parties to suits against the parish "is now supposed to be well settled; and so it was decided in cases of *King vs. Inhabitants of Wobum*, 10 *East.* 395, "*and the King vs. the Inhabitants of Hardwich*, 11 *East.*, "577." This decision was made in regard to an indebtedness created by municipal bonds issued in aid of a railroad company.

These authorities conclusively establish that the judgment against the town of Beloit, might be levied upon the real estate of the defendants, above described, but for the fact that our statute—which regulates the process of the Federal Courts within this State—*no execution can be issued* on the judgment. In other words, the complaint has a judgment at law, which ought to be satisfied out of the real estate in question, but has no remedy at law by which to make this right available. This is ex-

actly the case in which, by the authorities just quoted, a court of equity is bound to furnish an adequate remedy. Upon this ground alone, this bill is well brought.

II.

BY THE LAW, UNDER WHICH THE CONTRACTS SUED ON WERE ISSUED, IT WAS MADE THE DUTY OF THE TOWN BOARD TO LEVY A TAX; BUT AS THERE IS NO BOARD, NO TAX CAN BE LEVIED, THEREFORE THAT REMEDY AT LAW HAS FAILED, AND THIS BILL IS MAINTAINABLE.

It may be contended in reply to the first ground taken above, that inasmuch as the Legislature, in the act authorizing the issuance of the bonds, provided for a remedy by taxation, therefore that remedy is exclusive. I shall contend hereafter, that the remedy by mandamus to compel taxation is so tedious, embarrassed and ineffectual, that this bill should be maintained, even though no particular obstacle existed in the way of enforcing taxation. But waiving that for the present, it is clear that in this case this remedy, imperfect as it is at best, *is wholly unavailing*.

The law provided that "the Board of Supervisors" of said town should annually levy a tax. "The Board" consists by law of a Chairman and two other supervisors. From 1854 to 1863, the interest was maturing annually on these bonds, yet said board never levied any tax; and since the decision of the Court on our application for an attachment, that no tax could be levied while there was but one Supervisor in office, the defendants—the inhabi-

tants of the town—have taken care that there should be no board ; and for three years there has been none, and is none at present, to levy a tax. Therefore the mandamus totally fails, and the complainant is entirely deprived of that remedy.

This complainant recently went to the Supreme Court of the State of Wisconsin, on this very judgment and applied for a *mandamus* against the Supervisors to compel a levy of the tax. That Court decided on demurrer, or motion.

(1.) That it had jurisdiction to issue the writ, on a judgment of this Court ; and

(2.) That there was no defence that could be made on the merits to the issuance of the writ; all defences to the bonds being barred by the judgment.

Then the town answered that there was a vacancy in the board, because two of the Supervisors elected had nelected to qualify. Thereupon the Court decided .

(1.) That the failure of the two Supervisors to qualify, made their places vacant ;

(2.) That there was no provision in such case for filling the vacancy, until another annual election ; and therefore the Court denied the writ of mandamus. This decision is a conclusive construction of our Statutes ; and judicially determines that that remedy has failed.

It may be contended, that this bill is not an appropriate substitute for the remedy by taxation, because that would collect the amount of the judgment from all

taxable property in the town, while this makes satisfaction out of the property of one or two individuals.

The defendants—the inhabitants of the town—could at once elect a board of supervisors who would qualify and perform the duty of levying a lax. But as they refuse to do this, and collude together to defeat the remedy by taxation, they cannot be heard to object, that another remedy which is open to the complainant, is less convenient to them than the one they have persistently and for years defeated.

But a conclusive answer is given by the decision of the Supreme Court in Ogilvie vs. Knox Ins. Co.,22 How., 392. That was a creditor's bill filed against the Company and a few of the stockholders, to collect the judgment from unpaid stock subscriptions. The same objection was made there, that all the stockholders indebted to the company ought to be before the Court, so that a pro rata assessment could be made by the decree. This objection was overruled. The Court say : "If the debts "attached are sufficient to pay their demands, the credi- "tors need look no further. They are not bound to set- "tle up all the affairs of this corporation, and the equities "between its various stockholders or partners, corpora- "tors or debtors. If A is bound to pay his debt to the "corporation, he cannot defend himself by pleading that "these complainants might have got their satisfaction "out of B quite as well."

This language applies as well to this case as to the one in which it was spoken. This complainant is not bound to settle all the equities between these defendants and their neighbors. They have property out of which he is entitled to get satisfaction of his judgment ; and it is

no answer for them to say, he might as well get it out of some other, or all other, inhabitants of the town.

III.

THE REMEDY BY MANDMUS TO COMPEL TAXATION, IS NOT AN ADEQUATE AND CONVENIENT REMEDY, *and therefore a party might resort to a Court of Equity, even though no vacancy existed in the Board of Supervisors.*

It is not enough to preclude an exercise of the jurisdiction of a Court of Equity, that the complainant may have some sort of a remedy at law; it must be shown to be as prompt and efficacious as the remedy a Court of Equity is able to furnish.

In Boyer v. Grundy, 3 Pet., 215, the Court say: "It is "not enough that there is a remedy at law; it must be "plain and *adequate*, or, in other words, as practical and "efficient to the ends of justice, *and its prompt adminis-* "*tration* as the remedy in equity."

See also to same point:

Mitford's Pleadings, 25.
Weymouth v. Boyer, 1 Ves. Jr., 416.
Rathburn v. Warren, 10 John., 587.
King v. Baldwin, 17 John., 384.
Bank v. Lee, 11 Conn., 121.

Ins. Co. v. Fish, 1 Page, 90: "Whenever the remedy "at law is doubtful and difficult, a Court of Chancery has "jurisdiction."

See also, Whitlock v. Duffield, 2 Ed. Ch., 366. In

Barnes v. Lloyd, 1 How. Miss., 584, the Court by Sharkey, C. J., say: "His (the plaintiff's) remedy being *more* full "and complete in equity, affords a good ground for re- "taining the bill.

Now let us examine to see whether in the language of the Court in Boyer v. Grundy, 3 Pet., 215, the remedy by *mandamus* to compel taxation is "as practical and ef- "ficient to the ends of justice *and its prompt administra-* "*tion* as the remedy in equity." Let this record speak upon that subject:

January 9, 1860. Complainant recovered this judgment nine years after the bonds had been issued; and no tax had been levied to pay interest on the bonds during all those years.

January 16. 1862. Two years afer the rendition of this judgment, complainant applied for and obtained a peremptory writ of mandamus, to compel a levy of the tax; which remains in full force, but utterly ineffectual to this day.

January 12, 1863. Complainant applied for attachment, which was denied, on the ground of vacancy in the board.

May 7, 1863. Complainant, *after another annual election*, obtained a rule on the new board to show cause why a mandamus should not issue to them. They answered the vacancy in the board; and the rule pas discharged.

The records of the Supreme Court of the State would also show, that the complainant has for years, sought legal remedies in that Court on this judgment, and that Bushnell has likewise in vain used every legal remedy that Court can give him, to enforce collection of a judgment rendered against the town, in the State Court, on some of these coupons, in December, 1858; and the only result as yet, has been successive bills of cost against those who sought to enforce judgments on these bonds. In the light of these facts, can any Court say the defendant has a plain, adequate remedy at law, as *efficient to the prompt administration of justice* as a Court of Equity can give?

It may be said, that all this delay has been owing, not to a defect in the remedy, but to the accidental fact, that the Board of Supervisors has been vacant. Precisely, but that is a condition of things over which the complainant—a non-resident of the State—has no control; and one that the defendants—the inhabitants of the town—can continue at pleasure. The facts of this case strikingly illustrate the truth of the language of the Court in Bearsley v. Smith, 16 Conn., 376, speaking of the public duties of towns: In the performance of these [duties], they must contract debts and liabilities which can only be discharged, by a resort to individuals either by taxation or execution. *Taxation, in most cases, can only be the result of the voluntary action of the corporation* dependent upon the contingent will of a majority of the corporators, *and upon their tardy and uncertain action. It affords no security to creditors, because they have no power over it.* Such reasons as these probably operated with our ancestors, in adopting *the more effectual and certain remedy*, which has been resorted to in the present case

"(levy upon the private property of an inhabitant) and
"which they had seen to some extent in operation in the
"country whose laws were their inheritance."

A remedy which is at the mercy of the defendant, an unwilling debtor, is no remedy at all; and the history of this litigation shows, indeed it is so expressly adjudicated both by this Court and the Supreme Court of the State, that the remedy by taxation, is one over which the inhabitants of the town have complete control, and which they can arrest at pleasure by refusing to elect a board of supervisors, friendly to the levying of the tax. Taxation may not only be arrested by the resignation of the board of supervisors, but equally by the resignation of the town clerk, or collector, or any officer having any part to perform in our complicated system of taxation.

But this is not all; suppose all the officers legally elected and serving in their offices, but all unfriendly to the levying and collecting of this tax; how long would it probably take to collect this judgment?

First: the complainant, after demanding of the board of supervisors that they levy a tax, must wait till the month of December, for them to perform the duty. Prior to that time he cannot know whether they will do so or not.

They neglect to levy the tax, at the proper time; an attachment may punish them; but after the day on which they ought to have levied the tax, *they cannot do so;* and a pretended levy after that time would be of no avail; and before December comes again, at which they might make the levy, they are out of office, and a new board elected in their places; and so this matter may progress for a century.

Or, if after several years of experiment, the board should be cornered and compelled to *levy* the tax, the same game may be played by the town clerk, in making out the assessment roll; or by the collector in collecting it. Indeed, it is literally true, as said by the Court in the case last cited: "*Taxation depends upon the voluntary* "*action of the defendants, and is no security to the creditor,* "*because he has no control over it.*" Whereas, if the inhabitants of the town do not like *the drawing of this chancery rope,* they have full power, *and have had for thirteen years,* to relieve themselves by levying a tax to pay the judgment. Taxation is a remedy in their hands against all the real or supposed hardship of a proceeding like this; *it is their shield, but no sword for us because we cannot wield it.*

IV.

There is another reason why this remedy should be enforced. One of the learned counsel opposed, Mr. Ryan, has often, eloquently contended against the power of a federal court to lay its hand on the taxing process of the State—the machinery of another sovereignty—to satisfy its judgments. And although this objection was expressly overruled by the Supreme Court in *Com'r Knox v. Aspinwall*, 24 *How.*, 376, where it was held that the Circuit Courts of the United States might compel the levying of the tax; yet, the history of this litigation illustrates the difficulties and impediments in the way of exercising the power, which render that remedy well

nigh, if not utterly, worthless, as a coercive measure. Here, for years, this town has held the Federal Court at defiance; and compelled it to admit and decide that it was powerless in the premisses.

But the remedy invoked by this bill is wholly independant of state laws and state officers, as all remedies on federal judgments ought to be; and the whole matter is between the Goverment of the United States and its own citizens, bound by its laws, concluded by its judgments, compelled by its officers. This remedy is prompt and efficient; secures to the creditor his money adjudicated by a federal court, through the instrumentality of federal officers; while the defendants have it in their power to relieve themselves from its exercise, by resorting to their undoubted power of raising money under the state method of taxation. It furnishes to the creditor the remedy he has a right to demand; and cannot be regarded as a hardship upon the debtors, since it is in their power to relieve themselves from its application, by simply levying a tax which the laws of their own state have commanded them to levy, and what they by their solemn contract under seal have agreed to levy.

MATT. H. CARPENTER,

Solicitor for Complainant.

United States Supreme Court.

DECEMBER TERM, 1868.

SAMUEL C. MORGAN, Appellant,
vs.
THE TOWN OF BELOIT and others. } No. 108.

SAMUEL C. MORGAN, Appellant,
vs.
THE TOWN OF BELOIT and
THE CITY OF BELOIT. } No. 281.

THE UNITED STATES,
Ex. Rel. SAMUEL C. MORGAN, Plaintiff in Error,
vs.
EGBERT GATES, Town Clerk of the Town of Beloit. } No. 118.

Brief for the Respondent and Defendant in Error.

H. L. PALMER,
E. G. RYAN.

Daily Milwaukee News Steam Print.

Supreme Court of the U. S.

SAMUEL C. MORGAN,
Appellant,

vs.

THE TOWN OF BELOIT, SIMON RUBLE, A. R. PECK, ASAHEL HENDERSON, JOHN G. POTTER, WILLIAM ALVERSON, J. CHAMBERLAIN, E. F. GATES, AND JOSEPH BEMENT.

No. 108, Dec. T., 1868.

This is an appeal from a decree of the court below, dismissing the appellant's bill upon demurrer.

The bill was filed for the collection of a judgment at law in the court below, recovered by the appellant, on coupons of the bonds, discussed at this term, in Nos. 91 and 320.

The bill sets forth the act of Feb. 10, 1853; the election held under it; the subscription of the supervisors to the stock of the Racine, Janesville, and Mississippi Rail Road Company; the payment of the subscription in the bonds of the town; the judgment recovered by the appellant on coupons of the bonds, January 9, 1861; and the non-payment of the judgment.

The bill proceeds to state, that the supervisors had never levied a tax to pay the interest of the bonds, or the appellant's judgment; that the rail road company has never paid any dividend, and is insolvent; that the inhabitants of the town, and the supervisors, knew that there were no means

of paying the interest on the bonds and the judgment, except by tax under the act; that the appellant has demanded a tax to be levied, to pay his judgment; but that the supervisors refused to do so, or to make any provision to pay the judgment.

That, Jan. 16, 1862, the appellant obtained a *mandamus* from the court below, to the supervisors and town clerk, to levy a tax to pay the judgment, and served the same upon the supervisors and clerk, who refused to obey the same: that the appellant thereupon moved for an attachment, which was refused, because the supervisors, except the chairman, had resigned: that afterwards, the court below made a rule on the supervisors, to show cause why a *mandamus* should not issue to levy a tax to pay the judgment; but that, on hearing the rule, it appeared to the court that two of the supervisors had resigned before the rule was made, and that thereupon the rule was discharged.

That afterwards, the appellant filed in the office of the town clerk, an exemplification of the record of the judgment, with an affidavit that the judgment was in force and unpaid, and demanded of the clerk that he assess the amount of the judgment, and that the same be collected like other town taxes: but that the clerk refused to do so.

That *mandamus* is not an adequate, convenient, or efficacious remedy: that, by law, the clerk and supervisors are elected annually: that the tax could be levied only on one certain day: that it cannot be known, before that the officers will not do their duty, and that after, it is too late; and that the appellant is without any remedy at law, and can be relieved only in equity.

That the inhabitants of the town, for the purpose of evading payment of the judgment, and the levy of a tax to pay it, have fraudulently conspired together to prevent any board of supervisors from being; and that there has not been, since January 2, 1863, any board; that at each annual election since, the electors vote for persons opposed to paying the judgment, and then two of the persons elected, by previous

understanding, fail to qualify; so that there has been no board to obey the *mandamus*.

That, at an election held April 7, 1863, certain persons were elected supervisors and clerk; that in pursuance of the conspiracy two of the supervisors resigned April 24, 1863; and that their offices remained vacant until the election held April 5, 1864; and that in pursuance of the conspiracy, the same thing was substantially done at the elections of 1865 and 1866, so that the offices of supervisors, except chairman, remained vacant to the time of filing the bill.

That it is the intention of a majority of the voters, in that manner, to prevent there being any board of supervisors, so as to defeat the payment of the judgment.

That the individual defendants are residents and voters of the town, and hold therein respectively certain specified real estate, sufficient to pay the judgment.

That the other inhabitants of the town are numerous, and unknown to the appellant; that those made defendants are influential; and the bill calls on them for full discovery of all their real estate subject to taxation in the town, and asks that they may be taken to represent all the tax-payers in this suit. The bill prays that the real estate described may be sold to pay the judgment, and for general relief.

To this bill, the town and the other defendants demurred, severally. And the court below sustained the demurrers.

The decree of the court below should be affirmed.

I.

In the brief submitted to the court below, by the learned counsel on the other side, several authorities were cited, in England and New England, to the effect that the private property of every inhabitant is liable to execution against a *quasi* municipal corporation.

1. Without entering into any elaborate examination of the authorities, it is submitted that this is not the common law of America. We know of no American decision in favor of this doctrine, outside of New England, which is given to legal, as well as other notions. And it is believed that the doctrine is *local* there.

The whole doctrine seems to have grown out of the misapplication of some *dicta*, in *Russell vs. The men dwelling in the county of Devon*, 2 *Term R.*, 667.

ASHURST, J., indeed says: "If damages are recoverable against the county, at all events they must be levied on one or two individuals, who have no means of re-imbursing themselves." But this is said as a reason why the action would not lie, which the court unanimously held. LORD KENYON says: "Where an action is brought against a corporation for damages, those damages are not to be recovered against the corporators in their individual capacity, but out of their corporate estate. But, if the county is to be considered as a corporation, there is no corporation fund out of which satisfaction is to be made. Therefore I think that the experiment ought not to be encouraged; and there is precedent against it in *Broke;* though even without that authority, I should be of opinion that this action cannot be maintained." And ASHURST, J., says: "But it has been said that there is a principle of law on which this action might be maintained, namely, that where an individual sustains an injury by the neglect or default of another, the law gives him a remedy. But there is another general principle of law, which is more applicable to this case, that it is better that an individual should sustain an injury, than that the public should suffer an inconvenience." And he states the inconvenience to be the liability of individual property to execution.

But even if the doctrine in question should be considered to be the present doctrine of the English courts, it is submitted, that it is not the law here. *Russell vs. The men of Devon* was decided in 1787; and is no part of the common law which emigrated here.

If it be true, as we believe, that the rule in this country, at the end of nearly a century, is confined to New England, the decisions of that peculiar *imperium in imperio*, rather strengthen than lessen the argument. *Exceptio probat regulam.*

2. But, however that may be, the doctrine can have no relation to Wisconsin towns.

The doctrine of England and New England, is briefly and well stated by PARSONS, C. J., in *Riddle vs. Proprietors &c.*, 7 *Mass.*, 169, in these terms:

"We distinguish between *proper* aggregate corporations, and the *inhabitants* of any district, who are by statute invested with particular powers, without their consent. *These* are in the books sometimes called *quasi* corporations. Of this description are counties and hundreds, in *England;* and *counties, towns*, &c., in this state. Although *quasi* corporations are liable to information or indictment, for a neglect of a public duty imposed on them by law, yet it is settled in the case of *Russell et al., vs. Inhabitants of the County of Devon*, that no private claim can be maintained against them for a breach of their corporate duty, unless such action be given by statute. And the sound reason is, that, *having no corporate fund*, and *no legal means of obtaining one*, each corporator is liable to satisfy any judgment rendered against the corporation. This burden the common law *will not impose*, but in cases where the statute is an authority, to which every man must be considered as assenting. But, in *regular corporations*, which have, or are supposed to have, *a corporate fund*, this reason does not apply."

The corporate character of towns in Wisconsin, takes them wholly out of this doctrine.

"Each organized town shall be a body corporate, and as such may sue and be sued; and may appoint all necessary agents and attorneys in that behalf; and shall have power to purchase and hold real and personal estate for the public use of the inhabitants thereof, and to convey and dispose of the

same ; and to make all contracts that may be necessary and convenient for the exercise of its corporate powers, and any orders for the sale or disposal of its corporate property, which the inhabitants thereof may deem expedient." *R. S.* 1858, *Chap.* 15, *Sec.* 1. *R. S.* 1849, *Chap.* 12, *Sec.* 1.

Other sections give them power to levy taxes and fines.

Thus, the town of Beloit is, in the language of C. J. PARSONS, a *proper* aggregate corporation, not a *quasi* corporation, having a corporate fund, and legal means of obtaining one ; and to it, as such, the doctrine does not apply.

And it not only has a corporate fund, but has a special power and duty to levy a tax for the payment of judgments against it. *R. S.*, *Chap.* 15, *Sec.* 78.

Cessante ratione legis, cessat ipsa lex. There being a corporate fund, removes all reason for the cruel recourse to individual property.

3. It is said, in the statement of this doctrine, that where it applies, no action would lie except by statute. Here the very statute which gives the action, prohibits execution. *Sec.* 77.

If the statute has effect to give the action, it has also effect to take away the execution. And the right claimed is only to levy an execution upon individual property. The right grows out of the execution, and is dependent upon it. All *dicta* to the contrary are unsupported.

And, whatever may be the common law, the statute giving the right of action, prohibiting execution, and giving a particular process and fund for the payment of the judgment, operates, not only to take the case out of the reason of the common law, but to repeal it.

4. The ground on which the doctrine in question rests the right, to levy an execution against a *quasi* corporation, on the private property of corporators, is, that because it is not a corporation proper, the action is to be considered as against all the inhabitants.

On that theory, they have their day in court.

But here the individual defendants have never had their day in court. They cannot have it in this bill; for it does not seek a judgment against them, but only execution against them on a judgment against another, and against which they had no right or opportunity to defend.

And the decree for which the bill prays would violate two fundamental principles. It would deprive the defendants of their property, without due process of law, or the judgment of their peers. And it would take private property for public use, without compensation.

5. The doctrine itself admits its own cruelty and injustice. And a court of equity will not lend its aid to enforce an unjust and oppressive right, conceding it to be a right, in enforcing a judgment at law, which the court at law has no power to enforce. Equity jurisprudence is to mitigate, not to aggravate, the harshness and severity of law.

The bill seeks no relief against the town, makes no other case against the other defendants, and has no other specific prayer. And these objections are fatal to the whole bill.

II.

It is difficult to comprehend on what ground of equity jurisprudence, this bill is intended to rest. No specific ground was assigned for it in the court below. And we confess our inability to conjecture to what class of bills the learned counsel will attempt to assign it.

A good deal was said below about the difficulty of enforcing the judgment by *mandamus*. And *Boyce vs. Grundy*, 3 *Peters*. 210, was cited as an authority, that whenever the remedy at law is doubtful or difficult, a court of chancery has jurisdiction; and other cases were cited of like character. But they are all cases of concurrent jurisdiction at law and in equity. A mere *difficulty* to enforce a right at law, will

not give a remedy in equity. Equity is liberal in the adaptation of her remedies. But it is a mistake that she gives a remedy to every party in difficulty, unless his difficulty be covered by some specific ground of equitable jurisdiction. "The true nature and extent of equity jurisdiction, as at present administered, must be ascertained by a specific enumeration of its actual limits, in each particular class of cases, falling within its remedial justice." *Story's Equity*, *Sec.* 62.

Here, there is an adequate legal remedy, by *mandamus*, which the complainant is diligently prosecuting, as appears by the record in No. 118.

It is very true that he may find it a troublesome remedy. But he has it. And it was on the faith of that remedy, on the faith of the tax provided by the act of Feb. 10, 1853, and of the legal remedies to enforce the tax, that he purchased his bonds. That was his security, and by that he must abide, even if it prove to be a doubtful security.

It was said below, that a remedy at the mercy of the debtor, is no remedy at all. Without inquiring into the philosophical truth of that remark, it is enough to say that on the faith of that remedy, and of that alone, the complainant invested his money in these bonds.

Though a municipal corporation of the lowest order, this town is one of the machineries by which the sovereignty acts. Hallam ascribes much of the freedom of modern civilization to municipal corporations. They are an essential part of the State. They are a fractional integer of the United States. Their debt is part of the public debt. And the public debt rests mainly on the public faith. Whoever deals in it, credits the public faith, at his own risk.

And equity will not devise a new ground of jurisdiction, to enforce a cruel remedy, because a speculator in public faith is unlucky in his legal remedies.

It was also argued below, that the remedy sought by the bill was independent of state laws, as all remedies on federal judgments, it was said, ought to be. The remedy sought is as independent of federal, as of state laws. But the misfor-

tune of the argument is, that the court below has provided by rule, as by the act of Congress of 19th May, 1828, it had the power to do, that "when not otherwise directed by the laws of Congress, writs of execution, and the manner of proceeding thereon by the marshal, shall be as prescribed by the laws of Wisconsin."

It was also said in this connection that the remedy would not be oppressive, because the defendants could relieve themselves from it, by simply levying a tax to pay the judgment. We suppose the court will take judicial cognizance of the last federal census, so far as to know that eight persons are not a majority of the legal voters of the town of Beloit.

SAMUEL C. MORGAN,
Appellant,
vs.
THE TOWN OF BELOIT, and
THE CITY OF BELOIT.
No. 281, Dec. T., 1868.

This is an appeal from the decree of the court below, dismissing the bill, upon demurrer. The bill states the act of Feb. 10, 1853; the subscription of stock and issue of bonds; the act of March 31, 1856, incorporating the city of Beloit, within the limits of the town; an election, as provided in the last act, in favor of becoming a city under that act; the act of March 3, 1867, amending the city charter; the recovery of several judgments on coupons of the bonds, by the complainant, in the court below; the amount of the assessment roll of the town and city, for the several years in which the coupons matured, and the proportion in which the coupons should be paid by the city and town respectively; and that the city and town ought to pay interest on those amounts from the rendition of the judgments, and to pay each one-half of the costs of the judgments; and concludes with this prayer:

"To the end, therefore, that the defendants may, if they can, show why your orator should not have the relief hereby prayed, and according to the best and utmost of their several and respective knowledge, information, recollection and belief, full, true, direct, and perfect answer make, to all and singular the matters and things hereinbefore set forth; and that your orator may have such other and further relief, as the nature of his case may require, and as shall be agreeable to equity and good conscience;" and the prayer for process.

I.

The omission of any prayer for special relief is fatal to this bill. Were it not for this appeal, we should suppose the omission to be a clerical mistake.

There are, indeed, a few cases holding the dangerous and inconvenient rule, that a prayer for general relief is sufficient; and that the special relief may be prayed for at the bar, on hearing. But, even under that rule, the bill must indicate by its frame the special relief sought, which this bill does not.

Is this bill framed for a declaratory decree of the proportions in which the judgments should be paid by the city and town, leaving the plaintiff to his *mandamus*, to enforce a tax accordingly? Or is the bill framed for a decree awarding execution against the defendants? Or is the bill a confession that our plea in abatement, of the non-joinder of the city, in the actions at law, was well taken, and an effort to establish the liability of the city, after judgment at law, by decree in equity?

We do not know. A pleader who frames his bill, with a prayer for general relief only, even when permitted, does a bold act, and is bound to do it skilfully.

But this court has wisely abrogated the rule, that a bill *may* be framed with the prayer for general relief only. The 21st rule given by this court to the federal courts of equity, which is also the 21st rule in order of the court below, provides that "the prayer of the bill *shall* ask the special relief to which the plaintiff supposes himself entitled, and also shall contain a prayer for general relief."

Had the bill prayed any special relief, pertinent to the case made by the bill, the court might have granted any cognate relief, under the prayer for general relief. But under the prayer for general relief only, this court, under its own most judicious rule, can grant no relief whatever. The prayer for general relief must be accompanied by a prayer for special relief; a prayer for general relief only, is, under the rule, no prayer at all.

And this bill stands as a bill without any prayer, except the prayer for process ; and is clearly demurrable.

We refer, if reference be necessary, on this subject, to *Story's Eq. Pl.*, *Sec.* 42, 453; and *Lube's Eq. Pl.*, 285.

II.

Aside from the defective frame of the prayer, we do not sufficiently comprehend the scope of the bill, to argue other objections in detail. As far as we understand it, we have stated other objections to it in the brief submitted in No. 108.

THE UNITED STATES, Ex Rel.
SAMUEL C. MORGAN,
Plaintiffs in Error,
vs.
EGBERT GATES, Town Clerk of the town of Beloit.

No. 118, Dec. T., 1868.

This is a writ of error from an order of the court below, (*Record*, 42,) vacating another order of the court, to show cause why a writ of peremptory *mandamus* to the defendant in error, should not issue. (*Record*, 39.)

The return of the clerk of the court below embraces the record of the judgment at law, and this proceeding as growing out and forming a part of it. The proceeding itself commences on page 24, of the printed record.

The relator filed his petition, June 3, 1867, in the court below, stating a judgment recovered against the town of Beloit, which remained unpaid; that, August 4, 1866, he filed in the office of George Morse, then town clerk of the town, an exemplification of the judgment, with an affidavit that the judgment was in force and unpaid; that the judgment had not been assessed by the town clerk for taxation, although since the record was so filed, a tax had been assessed and collected; and that the defendant in error was the present town clerk.

This petition was verified, and accompanied by a notice, Aug. 1, 1866, to the town clerk to assess the amount of the judgment, in the tax roll of the town; by a transcript of the record of the judgment, attached as an exhibit to the notice; by an affidavit that the judgment was in force and unpaid, attached to the notice as an exhibit; by an affidavit of service, Aug. 4, 1866, on George Morse, town clerk; and by an affidavit that, Dec. 27, 1866, George Morse, then town clerk, stated to an agent of the relator, that he had not assessed the judgment, and had done nothing in regard to it.

Thereupon the court below made its order, that the defendant in error show cause why a writ of peremptory *mandamus* should not issue to him and his successors, to assess the amount of the judgment in the next town assessment, to be paid on the judgment; or why the writ should not issue in some other form.

This order was properly served; and afterwards the relator gave notice of a motion to amend his papers, by adding an affidavit that at the last town election, a certain person was elected chairman, and two certain persons supervisors, who both neglected to qualify; and that since the decision of the court below, that *mandamus* could not issue to the supervisors, in the premises, there had not been a board qualified to act; two being annually elected with the understanding that they should not qualify, for the purpose of not having a board. Afterwards, motions were made by the town and by the defendant in error, to vacate the order to show cause of June 3, 1867. The motion of the latter assigns the reasons on which it proceeds: 1, because the application shows no reason why the relator does not follow the remedies of the act of Feb. 10, 1853; 2, because the application shows no demand upon the defendant in error, and no refusal by him; 3, because the relator is bound to pursue the remedies of the act of Feb. 10, 1853; and the application does not show that such remedies have been exhausted, and failed.

Upon hearing the motion, the court below ordered that the order of June 3, 1867, be, and the same was, thereby vacated.

And this is the order to which the writ of error goes.

All these proceedings are entitled, in the action at law, in which the judgment was recovered: *Samuel C. Morgan vs. The Town of Beloit.*

I.

This is not a final judgment, to which a writ of error will lie in this court.

It is true that the court has held that the proceeding of *mandamus*, in the circuit and district courts, is an action, in which the judgment may be brought to this court by writ of error.

1. But there is no such *action* here. The relator saw fit to file his petition, and take his order, in the action at law in which he recovered his judgment, as an interlocutory proceeding therein, after judgment. It was not until after the order to which the writ of error is prosecuted, that it seems to have entered into the mind of the relator, that this was a separate action. Then, for the first time, we hear of the *United States, on the relation of Morgan vs. Gates*. Before, all the proceedings were in *Morgan vs. Beloit*.

And this was the plain understanding of all the parties at the hearing below. The defendant in *Morgan vs. Beloit*, moved to vacate, as well as the defendant in error. And it was on the motion of the defendant in *Morgan vs. Beloit*, and not of the defendant in error, that the order was granted.

Here is a defendant in error, in whose favor no judgment was rendered, brought here to defend an order granted to another party. If error lie on the order, the town of Beloit is the proper defendant in error.

It is submitted that the whole proceeding is void, because it was taken in another action, when it should have been a separate action. It is as if the relator had proceeded on his bonds in debt; and after judgment, proceeded in the same record, without any separate suit, to assess damages on his coupons in assumpsit.

If there be no action here, there could not well be a final judgment to which a writ of error would lie.

2. And there is no judgment in form. The whole proceeding is consistent with itself, as an interlocutory proceeding, in the action in which the judgment was rendered. And

it properly ends, not with a judgment denying the prayer of the petitioner, and that the defendant in error recover his costs ; but with a simple interlocutory order, vacating another interlocutory order, in *Morgan vs. Beloit*.

Error will not lie to this. *Wilson vs. Daniel*, 3 *Dallas*, 40. *Canal Company vs. Union Bank*, 8 *Peters*, 259. *United States vs. Girault*, 11 *Howard*, 22. *Van Ness vs. Van Ness*, 6 *Howard*, 62. *Brown vs. Wiley*, 4 *Wallace*, 165.

II.

The *mandamus* was prayed for to enforce the collection of a tax, to satisfy a judgment recovered on coupons of bonds issued under the act of Feb. 10, 1853, discussed in No. 91, at this term.

Under that act, Sec. 3, it is provided that the supervisors, whenever necessary, shall annually levy a tax to pay the interest on the bonds.

By the general law regulating towns, R. S., Chap. 15, Sec. 78, this is the mode provided for the payment of judgments against towns. An exemplified copy of the judgment, with an affidavit that the judgment is in force and unpaid, is to be filed in the office of the town clerk ; whereupon it is the duty of the town clerk to assess the amount on the next town assessment and tax roll, in a separate column, and the same is to be collected like other taxes, and paid to the proper party.

This latter is the proceeding which the relator has seen fit to take.

His proper remedy is by *mandamus* to the supervisors, whose duty it is to levy the tax under the act authorizing the issue of the bonds ; and not under the general provision relating to other judgments. This has been so held, by the Supreme Court of the State, and by this court. *State vs.*

Beloit, 20 *Wis.*, 79. *Knox Co. vs. Aspinwall*, 24 *Howard*, 376. *Von Hoffman vs. Quincy*, 4 *Wallace*, 535. *Walkley vs. Muscatine*, 6 *Wallace*, 481.

This is not a case of alternative remedies, of which the relator has an election. He can have but one payment, levied by one tax, once assessed. And if it be the duty of the supervisors to levy the tax, it cannot be the duty of the clerk. The special act providing for the special tax, to pay these special liabilities, to be levied by the supervisors, takes this judgment out of the general act, providing for the assessment of a tax by the clerk, to pay other judgments against towns.

And this view is, perhaps, strengthened by the language of Chap. 15, R. S. Sec. 77 provides that no execution shall issue on any judgment against a town. Sec. 78 provides for the payment of any judgment, rendered by any court of this State.

And the relator should have applied in the court below for *mandamus* against the supervisors, and not against the clerk.

III.

If the application were properly against the clerk, it is improperly made.

There must be a demand and refusal, previous to the application for the writ. *Tapping on Mandamus*, 5, 82, 282, 283. And it must be a demand made *personally*, to him from whom the duty is required. *Ib.*, 283–4.

Here the record was filed with a predecessor of the defendant in error; and there is no manner of proof that it ever came to his possession or knowledge. A demand accompanied the record; but it was a demand to levy the tax at the *next* town assessment, when the defendant in error was not in office. The demand was made August 1, 1866. The next assessment roll was made in December, 1866. *R. S., Chap.*

18, *Sec.* 60. And the defendant was elected in April, 1867. So that, even on the violent assumption that the judgment record and the demand bound the defendant in error, he could not possibly have done the thing specifically demanded.

If there be fault in this, it is the fault of the relator in framing his demand.

There was no personal demand made to the defendant in error, and no demand made to his predecessor, with which the defendant in error could have complied.

And even if this were otherwise, there was no refusal by the defendant in error.

The application for the writ was made June 3, 1867. No tax could be levied till December, 1867. So that there is no implied refusal, if implied refusal would be sufficient. And there is no evidence tending to show any refusal, or intent of refusal, on the part of the defendant in error.

The application should have been made, if against the clerk at all, against the defendant in error's predecessor, upon his failure to assess the amount of the judgment in 1866.

This point is not passed upon in *Soutter vs. Madison*, 15 *Wis.*, 30. The point there decided was, that, where some members of the council had changed after alternative *mandamus* served, that was no objection to the peremptory writ. That we suppose to be true; but that does not overrule the general principle, that demand and refusal must precede the alternative writ, of and by the very person to whom the writ is to go.

IV.

The application for the writ does not set out any failure of the board of supervisors to levy the tax, or any failure of *mandamus* directed to them. It is true, that such an application is in the printed record. But that could aid this application only upon the principle, that both applications are interlocutory proceedings in *Morgan vs. Beloit.*

So that, if this be a good application, it is unaided by the fact that the supervisors have failed to levy the tax, or that there is any difficulty in compelling them to do so. *Non constat* that the supervisors had not levied the tax, or are not perfectly willing and competent to do so upon demand, or are not in a position to be compelled to do so.

For these reasons the application of the relator was properly refused by the court below

H. L. PALMER.
E. G. RYAN.